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## Entry and Rate Regulation of Interstate Motor Carriers in Missouri: A Strategy for Reform

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# ENTRY AND RATE REGULATION OF INTRASTATE MOTOR CARRIERS IN MISSOURI: A STRATEGY FOR REFORM

PAUL H. GARDNER, JR. \*

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\* Law Clerk, Hon. Donald L. Manford, Missouri Court of Appeals, Western District. J.D., 1979, University of Missouri-Kansas City. I would like to thank Steve Imgarten and Ty Gaither for their valuable research assistance and criticism of this Article.

## I. INTRODUCTION

In recent years, a growing recognition of the costs imposed on the American economy by unnecessary regulatory programs<sup>1</sup> has generated significant deregulation at the federal level.<sup>2</sup> Although there is dispute concerning the proper nature, extent, and focus of the trend toward deregulation,<sup>3</sup> it is reasonable, in the absence of a major political change, to assume that it will continue.<sup>4</sup> An important question thus becomes whether federal initiatives will influence states to increase deregulation at their level. Where past federal regulatory endeavors rest on questionable policy assumptions, state legislation based on the same assumptions should also be vulnerable. Such is the case with motor carrier entry and rate regulation in the state of Missouri.

The conventional justification for the creation of federal and state regulatory agencies is that they are designed to protect the public against abuses of economic power and market imperfections.<sup>5</sup> In the motor carrier sector in Missouri, this goal was expressed in *State ex rel. National Trailer Convoy v. Public Service Commission*:<sup>6</sup>

The purpose of our public service commission laws is basically to secure uniformity of operating conditions among similar carriers; to secure adequate and sustained service for the public at the least possible cost; to prevent economic waste that follows useless duplica-

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1. See generally P. MAGAVOY, *THE REGULATED INDUSTRIES AND THE ECONOMY* (1979).

2. In the transportation industry alone, see the Motor Carrier Act of 1980, Pub. L. No. 98-296, 94 Stat. 793; the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011.

3. Although regulatory "capture" and "producer-protection" have gained currency as models describing the failure of much economic regulation to enhance consumer welfare, there is a growing body of literature challenging the explanatory power of these theories for the whole range of government regulation. See generally Schuck, Book Review, 90 YALE L.J. 702 (1981). Nevertheless, it is the position of this Article that the consequences of entry and rate regulation in the motor carrier industry are consistent with what could be expected from a producer-protection regulatory design. This conclusion does not depend on the validity of any particular theory of regulation.

4. Although the Reagan Administration has voiced an ideological commitment to the reduction of government intervention in the marketplace, the intensity of this commitment is subject to the vagaries of the political process. See Karr, *New ICC Chairman Reese Taylor Moves to Halt Trucking-Industry Deregulation*, Wall St. J., Aug. 5, 1981, at 1.

5. See generally M. BERNSTEIN, *REGULATION OF BUSINESS BY INDEPENDENT COMMISSION* (1955). One of the more recent defenses of government regulation as a public good is Gellhorn, *Deregulation: Delight or Delusion?*, 4 ST. LOUIS U.L.J. 469 (1980).

6. 488 S.W.2d 942 (Mo. App., K.C. 1972).

tion of service; and to protect and conserve investments already made to furnish and maintain such public service.<sup>7</sup>

The articulated justifications for Missouri Public Service Commission (P.S.C.) regulation in general, and motor carrier regulation in particular, are consistent with the arguments advanced in favor of similar legislation on the federal level. In the course of accepting these policy assumptions, Missouri has established a comprehensive legislative framework for the intrastate regulation of both common<sup>8</sup> and contract<sup>9</sup> motor carriers.<sup>10</sup>

Several classes of motor carriage are exempt from P.S.C. jurisdiction. Some of the more important are private carriers, school buses, taxicabs, various forms of agricultural transport, and transport within or between contiguous municipalities and commercial zones.<sup>11</sup> Non-exempt carriers,

7. *Id.* at 944-45. In *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App., K.C. 1973), the court characterized the statutory requirement that other carriers be considered in deciding whether to grant an operating certificate as announcing "a policy of regulated competition for the public benefit instead of officially regulated and sanctioned monopoly."

8. MO. REV. STAT. § 390.020.5 (1978) defines "common carrier" as "any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire or compensation upon the public highways."

9. *Id.* § 390.020.6 defines "contract carrier" as "any person which, under individual contracts or agreements, engages in the transportation . . . by motor vehicle of passengers or property for hire or compensation upon the public highways."

10. *See id.* §§ 390.011-.176 for the basic motor carrier regulatory scheme. The P.S.C. is empowered:

1. To license, supervise and regulate every motor carrier in this state; to make, fix or approve just and reasonable minimum, maximum, or minimum and maximum rates, fares and charges thereof; to make, fix or approve just and reasonable classifications, rules and regulations pertaining to rates, fares and charges thereof; by general order or otherwise, to establish reasonable requirements with respect to adequate and continuous service, uniform systems of accounts, records and reports, preservation of records, safety of operation and equipment; and to supervise and regulate motor carriers in these and all other matters affecting their relationship with the public.

. . . .

3. To establish just and reasonable classifications of types of carriers included in the terms "common carriers" or "contract carriers" as the special nature of the services performed by such carriers shall require; and by general order or otherwise, establish such just and reasonable rules, regulations and requirements, consistent with the provisions of sections 390.011 to 390.176, to be observed by carriers so classified or grouped, as the commission deems necessary or desirable in the public interest.

*Id.* § 390.041.

11. *Id.* § 390.030.

however, are subject to a form of economic regulation based on entry and rate-making controls.

### A. Entry Controls

Any non-exempt person or firm who wishes to engage in intrastate common<sup>12</sup> or contract<sup>13</sup> motor carriage in Missouri must apply for a certificate of public convenience and necessity from the P.S.C.<sup>14</sup> The application must be in writing and must include (1) full information concerning the ownership and financial condition of the applicant, equipment to be used, and its reasonable value; (2) the complete route or routes over which the applicant desires to operate, or the territory to be served, and (3) the proposed rates, schedule or schedules, or timetable of the applicant.<sup>15</sup>

Upon the filing of the certificate application, the P.S.C. sets a hearing date and gives notice to any carrier who has applied for a certificate between any of the applicant's proposed service points<sup>16</sup> and to any party who might, in the P.S.C.'s opinion, be properly interested in or affected by issuance of the certificate. Most important is the provision that notice of the hearing *must* be served on any competing or potentially competing common carrier. Any such carrier who complies with the P.S.C.'s rules and regulations "is an interested party to the proceeding and may offer testimony for or against the granting"<sup>17</sup> of a certificate.<sup>18</sup>

The determination that the public convenience and necessity<sup>19</sup> would be served by an additional carrier requires that the applicant carry the burden of "establishing the need for the service sought, that such service is in the public interest, and will not work an undue hardship or adversely burden or affect the ability to perform the public service being accomplished by existing carriers."<sup>20</sup> This burden "cannot be met by speculation, guesswork,

12. *Id.* § 390.051.

13. *Id.* § 390.061.

14. *Id.* §§ 390.051.1, .061.1.

15. *Id.* §§ 390.051.2, .061.2.

16. *Id.* §§ 390.051.3, .061.3.

17. *Id.* §§ 390.051.4(2), (3); .061.4(2), (3).

18. *See also* *State ex rel. Brink's, Inc. v. Public Serv. Comm'n*, 535 S.W.2d 582, 584-85 (Mo. App., K.C. 1976) (intervention proper even though service proposed by applicant is not same as that rendered by intervenor).

19. In the operating certificate context, the cases hold that the term "necessity"

does not mean "essential" or "absolutely indispensable;" rather, it requires that the evidence must show that the additional service would be an improvement justifying its cost and that the inconvenience of the public occasioned by the lack of a carrier is sufficiently great to amount to a necessity.

*State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App., K.C. 1973).

20. *State ex rel. National Trailer Convoy v. Public Serv. Comm'n*, 488 S.W.2d 942, 945 (Mo. App., K.C. 1972).

hopes or aspirations.”<sup>21</sup>

Although Missouri Revised Statutes section 390.051<sup>22</sup> vests considerable discretion in the P.S.C. to determine whether new entry should be granted, that agency is reminded in subsection 6 of that statute to “give reasonable consideration to the transportation service being furnished by any common carrier by rail or motor vehicle and *the effect which the proposed transportation service may have upon such carriers.*”<sup>23</sup>

No provision better illustrates the “cartel enforcement”<sup>24</sup> function of the operating certificate requirement. Perhaps the lawmakers of the time, not confident that the P.S.C. would protect the interests of incumbent certificate holders,<sup>25</sup> felt it necessary to prevent any accidental forays into economic decisionmaking that might enhance consumer welfare.<sup>26</sup> If this

21. State *ex rel.* Oliver v. Public Serv. Comm’n, 542 S.W.2d 595, 598 (Mo. App., K.C. 1976).

22. (1978).

23. MO. REV. STAT. § 390.051.6 (1978) (emphasis added).

24. “Cartel enforcement” is a term that describes the tendency of regulations to protect existing businesses while keeping others out of a particular sector. See Part IV.B. *infra*.

25. This apparent lack of confidence in the P.S.C.’s willingness to protect firms with pre-existing operating authority may have been misplaced. David Boies has pointed out that regulatory agencies come into direct contact only with representatives of regulated industries and organized consumer groups. This eventually leads to the belief that the good of the dominant regulated firms is identical with the public interest. Boies, *Experiment in Mercantilism: Minimum Rate Regulation by the Interstate Commerce Commission*, 68 COLUM. L. REV. 601, 610 (1968).

26. In his historical survey of the certificate of public convenience and necessity in various states, William Jones challenges the hypothesis that this device was the product solely of industry pressures for protection against competition. Rather, certification “was intended to meet genuine problems perceived by the public as well as the public service industries.” Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 435 (1979). Jones does not suggest, however, that salutary intent vindicates use of the certification device in structurally competitive markets:

[I]t is doubtful that the certificate of public convenience and necessity serves an essential role in markets other than those characterized by natural monopoly conditions. The considerations involving wasteful duplication of plant, ineffectiveness of competition, reduction of investment risk, and minimization of environmental damage appear to be valid for natural monopolies alone. Where multiple firms can provide economical service, there is no reason to oppose duplicate facilities or to assume that competition will be ineffective; investment risks will be greater and environmental damage must be controlled, but in the absence of natural monopoly conditions it is difficult to justify special controls for the public service industries that do not apply to others. . . .

... .

... In sum, there are strong reasons for believing that the certification requirement should be confined to natural monopoly markets, and  
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was not the intent underlying section 390.051.6, it nevertheless accurately describes the consequences of the operating certificate requirement. The role of this provision in preserving the anticompetitive status quo is underscored by court decisions holding that the P.S.C. was not properly solicitous of the effect of new entry on incumbent certificated carriers.<sup>27</sup>

### B. Rate-Making Controls

As previously noted, the P.S.C. has the power to comprehensively regulate the rates charged by non-exempt intrastate motor carriers.<sup>28</sup> Although it has apparent statutory authority to prescribe changes in rates when such rates are "unjust, unreasonable, unjustly discriminatory or unduly preferential,"<sup>29</sup> the law nowhere defines the economic standards it should use in judging the propriety of this rate-setting. The discretion necessarily reposed in the P.S.C. by these provisions is reinforced by the almost complete absence of decisional authority concerning the permissible scope of industry rate-making.<sup>30</sup>

The paucity of either statutory or judicial guidelines adds credence to the suspicion that motor carrier rate-making is an integral part of a govern-

that, even with respect to such markets, the administration of a certification program should take account of a broader range of factors than are typically considered.

*Id.* at 514-16.

27. See, e.g., *State ex rel. Orscheln Bros. Truck Lines v. Public Serv. Comm'n*, 433 S.W.2d 596, 603-06 (Mo. App., K.C. 1968). See also Part V. *infra*.

28. See note 10 *supra*. Also integral to the statutory rate-making regime is MO. REV. STAT. § 390.116 (1978), which provides:

1. Common carriers of property may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad or express; and common carriers of passengers may establish reasonable through routes and joint rates, fares or charges with other such carriers or with common carriers by railroad. In case of such joint rates, fares, charges or classifications, it shall be the duty of the carriers, parties thereto, to establish just and reasonable regulations and practices in connection therewith, and just, reasonable and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

2. The commission may, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own motion, order the establishment of just and reasonable through routes and joint rates, fares, charges, regulations or practices, applicable to the transportation of passengers or property by common carriers.

See also *State ex rel. Philipp Transit Lines v. Public Serv. Comm'n*, 523 S.W.2d 353, 356-57 (Mo. App., K.C. 1975).

29. MO. REV. STAT. § 390.121 (1978).

30. The most recent decisional statement on the subject of joint rate-making is found in *State ex rel. Philipp Transfer Lines v. Public Serv. Comm'n*, 599 S.W.2d 82, 84 (Mo. App., K.C. 1980).

ment sponsored cartel benefitting primarily those firms who already hold operating certificates. An assessment of this hypothesis begins with a survey of the historical foundations of motor carrier regulation.

## II. HISTORICAL FOUNDATIONS

The policy genesis of federal motor carrier legislation is exemplified by the Federal Motor Carrier Act of 1935,<sup>31</sup> which placed interstate trucking within the jurisdiction of the Interstate Commerce Commission (I.C.C.).<sup>32</sup> The history behind this legislation is well documented<sup>33</sup> and illustrates the political dynamics of administrative regulation of the economy. The origins of this regulation date to the Interstate Commerce Act of 1887.<sup>34</sup>

Enactment of the Interstate Commerce Act occurred during a period of explosive railroad growth, when railroad rates were falling. Entry into the railroad industry was extremely competitive and was encouraged by liberal grants of eminent domain by the states which allowed railroads easy acquisition of rights-of-way.<sup>35</sup> This intense competition gave rise to private cartels, with agreements to fix prices, divide markets, and pool revenues. Since such agreements were neither illegal nor legally enforceable,<sup>36</sup> the industry was characterized by shifts between fluctuating and stable prices, depending on the efficacy of private cartel enforcement.<sup>37</sup>

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31. Ch. 498, 49 Stat. 543 (1935) (codified at 49 U.S.C. §§ 301-327 (1976)) (repealed 1980).

32. *Id.* § 202(b) (codified at 49 U.S.C. § 301 (1976)) (repealed 1980).

33. For a description of the passage of the Motor Carrier Act of 1935, see Nelson, *The Motor Carrier Act of 1935*, 43 J. POL. ECON. 464 (1936).

34. Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. §§ 10101-11917 (1976 & Supp. IV 1980)).

35. This historical overview of railroad development is taken largely from the *National Commission Staff Paper on Antitrust Exemptions and Immunities*, 48 ANTITRUST L.J. 1219, 1301-08 (1980) [hereinafter cited as *Staff Paper*].

36. The Sherman Antitrust Act, which outlaws horizontal price-fixing, monopolization, and attempts to monopolize, was not passed until 1890, three years after the Interstate Commerce Act. *See* ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)). For an excellent study of the assistance given cartel enforcement by the I.C.C., see P. MACAVOY, *THE ECONOMIC EFFECTS OF REGULATION: THE TRUCK-LINE RAILROAD CARTELS AND THE INTERSTATE COMMERCE COMMISSION BEFORE 1900*, at 25-152 (1965).

37. One commentator contends that the problems behind the rate abuses that led to the creation of the I.C.C. arose in an era of "rapid and chaotic expansion":

There were basically two reasons for this expansion. First, new entry, unjustified by any reasonable prediction of demand or costs, was encouraged by public subsidy. Second, more new entry, and fluctuations in transportation rates, as well as differing rates for similar transportation services, was especially encouraged by the cartel dynamics of the era. Had the Sherman Act preceded the Interstate Commerce Act, both high and discriminatory rates might well have been eliminated by antitrust attacks on the railroad cartels.

Sims, *Current Antitrust Exemptions and Immunities*, 48 ANTITRUST L.J. 943, 953 (1980).  
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The Interstate Commerce Act was Congress's response to complaints from railroads and their shippers about rate structure instability. Although the I.C.C. initially lacked power to directly regulate rates, railroads were compelled to publish their rates and not deviate from them. In the years between 1887 and 1920, the I.C.C. acquired the authority to suspend and cancel discriminatory or excessively high or low rates and to set lawful rates.<sup>38</sup> It also was given plenary authority over railroad financing, construction of new lines, entry into and abandonment of service, and approval or disapproval of mergers and other control agreements involving railroads.<sup>39</sup>

With the extension of I.C.C. jurisdiction to barges and pipelines, its "hegemony . . . over surface transportation was nearly complete" until the 1920's.<sup>40</sup> At this point, technological advances in the internal combustion engine coupled with a vigorous increase in highway construction made it possible for trucks to make serious competitive inroads into the freight transportation sector.<sup>41</sup>

Two factors converged to make possible this erosion of rail transport dominance. First, highways became more accessible than rail transport to many shippers.<sup>42</sup> Where a shipper places a premium on speed, flexibility, and convenience, highway motor carriage will often be the most desirable option.<sup>43</sup> Second, railroads charged different rates to different users based on differing elasticities of demand for transportation services.<sup>44</sup> The I.C.C. acquiesced to the railroads' "value-of-service" rate-making principles, under which the railroads charged higher rates to shippers who had no real transportation alternatives and lower rates to those who did, regardless of the actual cost of service:

For example, a shipper of high-valued manufactured items, such as machinery, could be forced to pay a high railroad rate, since there was no other transportation alternative for this type of freight. And, where the cost of transportation was still a small fraction of the total

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38. See P. MACAVOY, *supra* note 36, at 123.

39. *Staff Paper*, *supra* note 35, at 1303.

40. Franzen, *Enforcing a Cartel: A Study of the ICC and the Motor Carrier Industry*, 11 S.W.U.L. REV. 597, 599 (1979).

41. Nelson, *supra* note 33, at 466-67.

42. *Staff Paper*, *supra* note 35, at 1303-04.

43. *Id.*

44. The concept of elasticity of demand refers to the responsiveness of the quantity demanded to changes in price. In a perfectly competitive market, any producer who offered output at a price above that which prevailed in such a market would make zero sales, since every buyer would look to an alternative producer. The demand for the output of any individual producer in such a market is thus perfectly elastic. When trucking became a viable transportation alternative for shippers, the demand for railroad transport by those shippers who were charged the highest rates became much more elastic. See generally Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 940, 983-86 (1981).

produce price, a high railroad rate was unlikely to elicit strong objections from the shipper.

By contrast, a shipper of bulk agricultural commodities could avoid high railroad rates by using water transportation. Furthermore, because transportation costs are a significant fraction of the total produce price of such commodities, increases in rates would meet with vigorous protest from shippers of commodities of this type. Thus, the rate structure evolved in such a way that rates were high (both absolutely and relative to the costs of service) for high-valued manufactured items, and low for low-valued bulk commodities.<sup>45</sup>

In essence, trucks were frequently the best means of transport for those shippers charged the highest rates. The result was an accelerated shift to trucking. This change in the economics of freight transportation, enhanced by prevailing I.C.C. rate practices, set the stage for railroad support of political intervention in the marketplace.<sup>46</sup>

Beginning in the mid-1920's, proposals for I.C.C. regulation of motor carriers were introduced in virtually every session of Congress until the Motor Carrier Act was finally passed in 1935.<sup>47</sup> The onset of the Great Depres-

45. *Staff Paper*, *supra* note 35, at 1304. As Sims has observed:

In sum, the shipper of bulk commodities has an elastic transportation demand, while the shipper of high-valued manufactured items has a relatively inelastic transportation demand. Accordingly, a profit-maximizing railroad would find it in its interest to charge higher prices relative to cost for the manufactured items than for the bulk items. This is precisely what the ICC allowed the railroads to do by adopting value-of-service ratemaking principles.

Sims, *supra* note 37, at 961.

46. *Staff Paper*, *supra* note 35, at 1304-05.

47. Ch. 498, 49 Stat. 543 (1935) (codified at 49 U.S.C. §§ 301-327 (1976)) (repealed 1980). See Franzen, *supra* note 40, at 599. One commentator has described the political environment leading to the passage of the Motor Carrier Act of 1935 as follows:

By 1935, besides the railroads and the ICC, the groups favoring regulation of trucking included large truckers, organized labor, and some shippers. The large truckers thought that the 'irresponsible' low rates of small truckers had led to railroad rate reductions which adversely affected all competitive trucking. The hope of these large scale operators was that regulation would prove more compatible with their survival and lead to an attrition of the smaller operator. Labor was closely aligned with the large truckers and saw the Act as a means to protect wages and working conditions against the competition of the small scale enterprise and the owner-operator. The attitude of shippers was mixed, with many unqualifiedly opposed, viewing the Act as an effort to raise rates and ultimately restore railroad dominance over the rate structure. However, of 161 shippers who responded to Commissioner Eastman's inquiry, 97 percent favored some form of regulation (enough government control at least to stabilize the in-

sion served as an important catalyst for the regulation of interstate trucking.<sup>48</sup> As the railroad economy continued to deteriorate, Congress became receptive to arguments that trucking should be subject to the kind of entry and rate regulation already imposed on the rail sector.<sup>49</sup> In 1935, declining faith in the efficacy of the marketplace produced an interstate regulatory scheme which has been anathema to economic efficiency and derivative consumer welfare for almost half a century.<sup>50</sup>

### III. ECONOMIC ANALYSIS OF REGULATION

A proper understanding of the anticonsumer implications of a regulatory apparatus that combines entry and rate-making constraints requires a basic discussion of relevant microeconomic theory. The principles involved, although relatively simple, provide the basis for a powerful critique of conventional attempts to use political instrumentalities to regulate inherently competitive industries.

#### A. *The Economic Theory*

Under conditions approaching pure competition, no one firm can influence the market price of an industry product or service because the firm's output is insignificant compared to total industry output.<sup>51</sup> Like any seller, the competitor will adjust his rate of output to a point at which marginal

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dustry), but only 20 percent favored complete regulation of service and rates comparable to the existing railroad regulation.

Steinfeld, *Regulation Versus Free Competition—The Current Battle Over Deregulation of Entry into the Motor Carrier Industry*, 45 ICC PRAC. J. 590, 595 (1978).

48. See generally Nelson, *supra* note 33, at 464-71.

49. Boies, *supra* note 25, at 614.

50. Recognizing the need to encourage competition in the interstate motor carrier industry, Congress passed the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 49 U.S.C.), which reduced the ability of the ICC and existing carriers to utilize the operating certificate process to thwart new entry. Preliminary reports indicate that this legislation is having a healthy effect on price and service competition. In a survey of 2200 of the nation's large manufacturers, 65% reported getting lower truck rates after deregulation. Among the nation's largest manufacturers with average sales of \$1.2 billion, savings in the past 12 months have averaged \$1.8 million of their \$23.7 million truck freight bills. The recent Federal Trade Commission report evaluating the impact of the new Act cites an estimate that rate discounting by certain leading carriers in the year since the Motor Carrier Act of 1980 was passed cut overall rate increases from 17% to 12%. D. Breen, *Regulatory Reform and the Trucking Industry: An Evaluation of the Motor Carrier Act of 1980*, at 27 (March 1982) (unpublished manuscript submitted to the Motor Carrier Rate-making Study Commission). See also Williams, *Trucking Deregulation Has Cut Rising Costs, Improved Service in a Year*, *Shippers Say*, Wall St. J., June 30, 1981, at 11.

51. R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 92 (1978).

cost<sup>52</sup> equals marginal revenue.<sup>53</sup> Marginal revenue, however, will equal market price only for a pure competitor.<sup>54</sup> Consumer welfare is maximized under these conditions because industry output is made available to buyers at a price that equates the *real* or *opportunity* cost (the value for other uses of the resources used in producing the output) with the marginal cost.<sup>55</sup> This allocatively efficient result is a principal goal of antitrust enforcement<sup>56</sup> and illustrates the competitive tendency of the motor carrier industry when market forces are not distorted by government price and entry regulation.

In contrast to a firm in a competitive market, a monopolist possesses sufficient economic power to restrict industry output and influence the price

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52. "Marginal cost" is the increment of total cost that results from producing an additional unit of output.

53. "Marginal revenue" is the increment of total revenue that results from selling an additional unit of output.

54. R. BORK, *supra* note 51, at 99.

55. As Bork observes in the context of a hypothetical widget industry:

This solution is not merely 'correct' for the industry but also for consumers. The forces of competition have balanced social desires and costs through the intermediary of the widget industry. The demand curve expresses the amounts that consumers are willing to pay for widgets as against all other uses of their purchasing power; it expresses, at all prices shown, their desire for widgets at different prices relative to their desire for all other things the market has to offer: automobiles, bubble gum, education, sweet potatoes, whiskey, medical services, ski lessons, or what have you. The demand curve thus expresses a social ranking of wants. Similarly, the marginal cost curve expresses the cost not merely to the firm or the industry but to the society of producing widgets. We are talking here about real costs, not historical costs or bookkeeping costs, and the cost of using a unit of a resource is the maximum amount that unit could earn elsewhere. Real costs are thus forgone alternatives or opportunities, and so they are often called alternative or opportunity costs. These are brought home to the widget maker through the price he must pay for factors of production. If he must pay \$50 for a ton of steel, that is the price of bidding that ton away from alternative uses. And his cost is also the real cost to society, because the ton of steel was valued in the alternative use at \$50. Thus, when the widget firm and the widget industry equate demand and marginal cost, they also equate social desire and social cost. The closer the members of the industry come to maximizing their profits, the closer they come to maximizing the welfare of consumers.

*Id.* at 97.

56. The principal doctrinal dispute in antitrust focuses largely on the emphasis to be given short run "efficiency" considerations in antitrust enforcement versus longer run, less verifiable economic and political factors. Although practically any foray into competition theory is imbued with the potential to catalyze this dispute, the conventionally identified assault on consumer welfare posed by government-sponsored trucking cartels is, in fact, short run allocative inefficiency.

of the product.<sup>57</sup> Under monopoly conditions, marginal revenue will be less than market price, and the profit maximizing level for the monopolist will *not* be at the competitive output rate.<sup>58</sup> The monopolist will find it profitable to restrict output, which increases the scarcity value of the product and bids the price up.<sup>59</sup> Since output is restricted, the monopolized industry requires fewer resources; unused resources lie wastefully idle or shift to other uses where their marginal value is less than it would be in the monopolized industry.<sup>60</sup> It is this misallocation of resources, generated by the restriction of output and increase in price, that constitutes the principal economic argument against monopolies and cartels.<sup>61</sup>

A related argument arises from the transaction costs incurred in attempting to obtain a monopoly profit.<sup>62</sup> The expenditure of resources in organizing and sustaining a cartel are social wastes. In the case of entry and rate regulation, these transaction costs are institutionalized by the process of obtaining a certificate of public convenience and necessity. Not only is allocative inefficiency encouraged by rate and entry regulation, but the regulatory process itself is a waste of resources that could be used more productively elsewhere.

Allocative inefficiency is the most commonly recognized cost of monopoly, but it is not the only one. Monopoly has also been found objectionable on the grounds that it retards innovation,<sup>63</sup> redistributes income

57. Analysis of the anti-consumer welfare effect of monopoly applies equally to arrangements where competing firms substitute price and output agreements for independent decision making. A successful cartel has the same output-restricting consequences (higher prices, misallocation of resources) as a single firm monopoly. See R. BORK, *supra* note 51, at 101.

58. *Id.* at 99-101.

59. *Id.* At this point marginal cost and price are unequal and, given some elasticity of demand, some consumers will refuse to buy or will reduce their purchases of the monopolized good or service. Those consumers who seek alternatives to the monopolized product will be purchasing a good that costs society more to produce, since the value of the alternative purchase will be somewhere between the competitive market price and the monopoly price.

60. Although some may consider the "excess profits" collected by a monopolist an important evil, economists are concerned primarily with the "deadweight welfare loss" to society that results from allocative inefficiency. This loss is a function of the output restrictive effect of monopoly and is not appropriated by either producer or consumer. See Kamerschen, *The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics*, 27 MERCER L. REV. 1061, 1095 (1976).

61. R. BORK, *supra* note 51, at 101.

62. The costs involved in procuring and maintaining monopoly are discussed in R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 10-18 (1976). See also Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 508-515 (1974); Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 820 (1975).

63. This argument generates disagreement among economists, in part because the problems of measuring innovation are formidable. See Note, *An Economic and Legal Analysis of Physical Tie-Ins*, 89 YALE L.J. 769, 775 n.31 (1980).

unacceptably,<sup>64</sup> and reduces incentives for productive efficiencies.<sup>65</sup> As will be demonstrated later, productive efficiency loss is a particularly serious consequence of motor carrier entry and rate regulation.

### B. *The Natural Monopoly Argument*

The traditional policy justification for public utility regulation arises from the so-called "natural monopoly" argument.<sup>66</sup> An examination of this assertion shows that none of the conditions necessary for a natural monopoly exists in the motor carrier industry.

The essential cost characteristic of a theoretical natural monopoly is that "production of the good in question exhibits decreasing marginal and average cost over a wide range of output levels,"<sup>67</sup> i.e., the bigger the company, the more cheaply it can produce the good. As a result of increasing returns to scale and unit cost advantages, large firms will have the ability to underprice smaller firms and banish them from the market.<sup>68</sup> Since it would be inefficient to prevent the concentration of an industry where scale economies confer cost savings, the conventional approach has been to allow the monopoly to develop and regulate it to avoid monopoly abuses.<sup>69</sup>

Without digressing into an extensive investigation of the efficacy of this type of regulation,<sup>70</sup> it is sufficient to observe that the cost conditions of natural monopoly are absent in an unregulated motor carrier environment.<sup>71</sup>

64. The distributive effects of monopoly, like the effects of innovation, are subject to dispute. Normative community judgments concerning the proper distribution of income obviously influence this assessment to a degree not implicated by efficiency considerations. The ascendant trend in the thinking about antitrust enforcement goals relegates the distributive effects of monopoly to secondary status. See Kamerschen, *supra* note 60, at 1097-98; Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1059-60 (1979).

65. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1515 n.12 (1972).

66. *Staff Paper*, *supra* note 35, at 1310.

67. J. NICHOLSON, MICROECONOMIC THEORY 346-47 (2d ed. 1978).

68. Snow, *The Problem of Motor Carrier Regulation and the Ford Administration's Proposal for Reform*, in REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 3, 39 (P. MacAvoy & J. Snow ed. 1977).

69. *Id.*

70. For an excellent critique of some of the assumptions underlying public utility regulation, see Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

71. At least one former official of the Missouri Public Service Commission has candidly admitted that the theory of "natural monopoly" does not apply to motor carrier regulation:

The underlying theory of regulation of motor carriers is completely different than the "natural monopoly" theory; it is, rather, . . . "regulated competition." They were regulated in an effort to protect the existing regulated railroads from the intrusion of others who could provide an equivalent type service. Then once some carriers became regulated, they

The most recent studies demonstrate that there are no long run economies of scale in the motor carrier industry.<sup>72</sup> The ratio of fixed costs to variable costs is low,<sup>73</sup> capital investment is not prohibitive, no sophisticated technological capability is necessary,<sup>74</sup> and there are no major legal hurdles such as patent or trade secret laws.<sup>75</sup> The comparative ease with which vehicles can be transferred from one market to another makes for high resource mobility and an extremely rapid entry response to supracompetitive pricing. Simply put, firm size yields no cost advantage in an unregulated motor carrier industry.<sup>76</sup>

The absence of structural characteristics attributable to natural monopoly

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encouraged future regulation as protection against the entrance of too many other carriers.

Baron, *Jurisdiction of the Missouri Public Service Commission*, 34 J. MO. B. 27, 35 (1978).

72. Klem, *Market Structure and Conduct*, in REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 119, 119-38 (P. MacAvoy & J. Snow ed. 1977). The question of whether economies of scale exist in the motor carrier industry has significant policy implications. If such economies exist, costs will rise less than proportionately with output, marginal cost will be less than average cost, and firms pricing at marginal cost in a competitive environment will not produce revenues sufficient to cover their costs in the short run. In the motor carrier industry, this translates into a concern that large interregional carriers might encroach significantly upon the traffic of smaller intrastate carriers. Such fears are unwarranted because once interregional carriers entered regional and intrastate markets, they would assume the operating characteristics of those market environments:

The mass of evidence indicates that each carrier type has "adapted" to its environment, in that each class generally attains lowest average costs for the type of traffic it most often handles. In the event of deregulation, current inefficient firms will face their greatest competition from firms that will essentially replicate the current modes of operation, following a policy of simultaneous route consolidation *and* route "fill-ins," as opposed to "superlarge" firms that will attempt to usurp existing route patterns and carrier operations. Thus, short-haul, small-shipment traffic will remain in the hands of small firms specializing in such traffic, while long-haul, large-shipment traffic will remain the domain of the large, interregional carriers.

Friedlaender, *Equity, Efficiency, and Regulation in the Rail and Trucking Industries*, in CASE STUDIES IN REGULATION 102, 129 (L. Weiss & M. Klass ed. 1981).

73. Calof, *Private Carriage on Trial: Competition in the Motor-Transportation Industry*, 21 STAN. L. REV. 1204, 1222-23 (1969).

74. Boies, *supra* note 25, at 652.

75. *Id.*

76. A study of intrastate motor carriers in California found the following: [I]n terms of financial stability, the ability to gross revenue per dollar of expenditure and to generate net income from gross revenue, the small carriers have a significant advantage compared to their large competitors. The tests suggested that the optimum size carrier is the small firm . . . and that . . . diseconomies of scale exist in the trucking industry.

Patton, *Implications of Motor Carrier Growth and Size*, TRANSP. J., Fall 1970, at 47.

obliterates this argument for direct economic regulation of motor carriers. The classical free market model is much more descriptive of the competitive tendencies of an unregulated motor carrier industry. Where market mechanisms are allowed to operate without the kind of direct regulatory interference represented by entry and rate-making controls, supply and demand will encourage the most efficient price/service combination.<sup>77</sup>

#### IV. ANTICONSUMER CONSEQUENCES OF REGULATION

Section 390.011 of the Missouri Bus and Truck Law<sup>78</sup> declares that it "is enacted for the sole purpose of promoting and conserving the interests and convenience of the public."<sup>79</sup> Though this aim is laudable, it is not a meaningful description of the actual consequences of motor carrier entry and rate regulation. Instead of protecting consumers,<sup>80</sup> Missouri's motor carrier scheme increases and sustains the power of regulated private entities to influence the pricing, output, and allocative decisions of the intrastate motor carrier market.<sup>81</sup> The producer-protection scenario has been historically realized in the motor carrier industry through rate regulation and entry

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77. *Staff Paper*, *supra* note 35, at 1312. Recent developments in economic theory underscore the desirability of permitting the market to make resource allocation decisions. Contrary to conventional oligopoly theory, this research suggests that when there is a duopoly or oligopoly for each and every good, a firm must set its price at the competitive marginal cost level. "Optimality is *not* approached gradually as the number of firms supplying a commodity (or service) grows." Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1, 6 (1982). Thus, two firms can be enough to guarantee optimality. One of the more important conclusions to be drawn from this research is "the questionable desirability of artificial impediments to entry":

The new analysis merely reinforces the view that any proposed regulatory barrier to entry must start off with a heavy presumption against its adoption. Perhaps a bit newer is the emphasis on the importance of freedom of exit which is as crucial a requirement of contestability as is freedom of entry. Thus we must reject as perverse the propensity of regulators to resist the closing down of unprofitable lines of activity.

*Id.* at 14.

78. MO. REV. STAT. §§ 390.011-.240 (1978).

79. *Id.* § 390.011.

80. This Article adopts the position that "consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit." R. BORK, *supra* note 51, at 90. Although this assumption constitutes my basic framework for argument against motor carrier entry and rate regulation, I do not mean to exclude redistributive effects from the public interest calculus. The transfer of wealth from shippers and consumers to the beneficiaries of regulation is a legitimate area of public policy concern which fortifies the efficiency arguments against the present motor carrier scheme.

81. See Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 J.L. & ECON. 151, 153 (1972).



controls. Both of these mechanisms are present in Missouri's motor carrier scheme. Neither is an acceptable alternative to reliance on the kind of competitively structured marketplace that would otherwise exist.

#### A. *Rate Regulation: Horizontal Price-Fixing*

The P.S.C.'s comprehensive authority over motor carrier rate-making is supplemented by other statutory provisions affecting motor carrier pricing. Chapter 387<sup>82</sup> contains provisions that require common carriers to file with the P.S.C. "schedules showing the rates, fares and charges for the transportation of passengers and property" within Missouri.<sup>83</sup> Until these schedules are filed, no common carrier may engage in the intrastate transfer of people or property.<sup>84</sup> Once filed, the rates may not be circumvented by "any special rate, rebate, drawback or other device or method."<sup>85</sup> Granting or attempting to grant lower rates is expressly prohibited.<sup>86</sup> In the absence of an order from the P.S.C., changes in previously filed rates may be made only after thirty days' notice to that agency and publication of the proposed changes for thirty days.<sup>87</sup>

The effect of these provisions is to build price rigidity into the system. Although certain statutory provisions purportedly give the P.S.C. discretion to set "just and reasonable rates and charges,"<sup>88</sup> general commodity rate-making is actually initiated by rate bureaus comprised of carriers operating in a specific geographical area<sup>89</sup> or carrying particular commodities.<sup>90</sup> These carrier representatives meet to agree on rates for the type of traffic carried by members of the particular bureau.

In non-regulated contexts, price-fixing by competitors is a per se<sup>91</sup> violation of the Sherman Antitrust Act,<sup>92</sup> as well as state antitrust law.<sup>93</sup> In motor carrier markets regulated by the I.C.C., however, pricing by rate bureaus

82. MO. REV. STAT. §§ 387.010-.400 (1978). See note 10 *supra*.

83. *Id.* § 387.050.1.

84. *Id.* § 387.040.

85. *Id.* § 387.100.

86. *Id.* § 387.130.

87. *Id.* § 387.070.

88. *Id.* §§ 387.030, .041.

89. Common carriers are represented in general commodity rate proceedings by the Middlewest Motor Freight Bureau, which consists of carriers operating in Wyoming, Colorado, North and South Dakota, Nebraska, Kansas, Missouri, Iowa, Minnesota, Wisconsin, and Illinois. See *Staff Paper*, *supra* note 35, at 1307.

90. See 4 MO. CODE ST. REG. 240-110.060.

91. In the context of antitrust law, a "per se" violation refers to those offenses for which no defense is permitted once the prohibited activity is shown to have taken place. Price-fixing agreements among competitors are the clearest examples of per se violations. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940).

92. 15 U.S.C. §§ 1-7 (1976).

93. See MO. REV. STAT. § 416.031 (1978).

has been insulated by express statutory immunity.<sup>94</sup> The lack of antitrust enforcement against state rate bureau activity in Missouri suggests that the federal immunity, or an implied variant, is somehow perceived to carry over into intrastate markets. As I shall detail later, this perception is erroneous.

The principal criticism of collective rate-making is that it is nothing less than horizontal price-fixing—a practice clearly prohibited under antitrust laws. The reasons for legal prohibitions against price collusion among competitors are identical to those against monopoly. The restriction of output and price competition, the inevitable result of entry and rate regulation, insures that the welfare loss to society will manifest itself in the form of higher costs for shippers and higher prices to consumers.<sup>95</sup>

### B. *Entry Regulation: Cartel Enforcement*

In order to guarantee the long-term survival of a rate-fixing cartel, it is necessary to provide an effective enforcement mechanism.<sup>96</sup> In the motor carrier arena, this objective is largely accomplished by the certificate of operating authority.<sup>97</sup> The inherent instability of cartels, which generates the need for this mechanism, is particularly acute in an industry, like motor carriage, that exhibits a strong competitive structural bias. In the absence of some kind of administrative control over entry, formidable cartel enforcement problems will emerge.<sup>98</sup>

Assuming the initial success of a rate-fixing agreement in extorting monopoly rents,<sup>99</sup> the prospect of collecting supracompetitive profits will attract new entrants to the industry. These newcomers will obviate the output-restricting benefits of cartel membership.<sup>100</sup> Similarly, a recalcitrant

94. See 49 U.S.C. § 5b (1976). This federal antitrust immunity will be phased out on January 1, 1984, pursuant to the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 14, 94 Stat. 793, 803 (codified at 49 U.S.C. § 10706 (Supp. IV 1980)).

95. Even where rates are not collectively set by the motor carriers themselves, the results will not comport with consumer welfare. As a result of the impossibility of evaluating the cost structure of each firm in an industry characterized by atomized competition, the P.S.C. must rely on a crude "average cost of service" standard. The standard fails to reflect actual operating conditions for many carriers and discourages cost-justified rate differentials. For example, the California Public Utilities Commission decided to eliminate minimum rate tariffs for the hauling of petroleum products after it found that the minimum rates had increased transportation costs to shippers and raised the ultimate price of petroleum products to consumers. ST. MOT. CARR. GUIDE (CCH) ¶ 15,791 (1979).

96. See P. MACAVOY, *supra* note 36, at 312.

97. These certificates are equivalent to Missouri's certificate of public convenience and necessity. See Part I.A. *supra*.

98. The ensuing discussion of cartel economics is taken largely from G. STIGLER, *THE THEORY OF PRICE* 231-33 (3d ed. 1966).

99. "Monopoly rent" is "a term economists apply to any return obtained by virtue of controlling a scarce or unique factor of production." Posner, *supra* note 70, at 562.

100. G. STIGLER, *supra* note 98, at 232. See also Jordan, *supra* note 81, at 172.

firm may abstain from participation in the cartel, increase its output at the monopoly price, and thus enhance profits and expand market share.<sup>101</sup> The prospect of "free rider" status will erode the kind of cooperative participation necessary to sustain the cartel.<sup>102</sup>

Cartel participants, who share the same motivations as the newcomers, also tend to undercut the agreed price in order to attract customers from other member firms.<sup>103</sup> Where there is no effective mechanism to control entry, the drive to maximize profits will quickly destroy the capacity of a private cartel to function in a structurally competitive industry.

It has become increasingly apparent that the potential for anticompetitive abuse of government instrumentalities is substantial.<sup>104</sup> This is particularly true in operating certificate proceedings that create a framework for legalized opposition to market entry. As we have seen, the applicant bears the burden of proving that the public convenience and necessity would be served by his entry into particular intrastate motor carrier markets.<sup>105</sup> This burden of producing evidence results both in higher litigation expenses and a costly diversion of the prospective entrant's time and resources.<sup>106</sup> These costs are particularly burdensome for small firms that finance initial operations by borrowing and have thin or nonexistent capital reserves.<sup>107</sup> Nor does the success of this tactic depend on the ability of certificated firms to absolutely defeat entry:

The predator need not expect to defeat entry altogether. He may hope only to delay it. Sham litigation then becomes a useful tactic against any size firm, regardless of relative reserves, for it may be worth the price of litigation to purchase a delay of a year or several years in a rival's entry into a lucrative market. In such cases, successful predation does not require that the predator be able to impose larger costs on the victim, that the predator have greater reserves

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101. This enforcement problem is exemplified by the recent inability of the Organization of Petroleum Exporting Countries to sustain pricing levels above those desired by Saudi Arabia. See Tucker, "The Energy Crisis is Over," HARPERS, November 1981, at 25.

102. G. STIGLER, *supra* note 98, at 231-33.

103. *Id.* See also Hilton, *The Consistency of the Interstate Commerce Act*, 9 J.L. & ECON. 87, 89-92 (1966), which confirms that virtually all railroad cartel agreements disintegrated due to cheating by cartel members before passage of the Interstate Commerce Act. Hilton also demonstrates that prohibitions against price discrimination facilitated horizontal price-fixing among the railroad carriers. *Id.* Similar prohibitions are found in Missouri's motor carrier scheme at MO. REV. STAT. § 390.121 (1978). See also P. MACAVOY, *supra* note 36, at 312.

104. See R. BORK, *supra* note 51, at 347.

105. State *ex rel.* National Trailer Convoy v. Public Serv. Comm'n, 488 S.W.2d 942, 945 (Mo. App., K.C. 1972).

106. R. BORK, *supra* note 51, at 347-48.

107. See generally Miklius & Casavant, *Stability of Motor Carriers Operating Under the Agricultural Exemption*, in REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 271, 278 (P. MacAvoy & J. Snow ed. 1977).

than the victim, or that the predator have better access to capital than the victim. No other technique of predation is able to escape all these requirements, and that fact indicates both the danger and the probability of predation by the misuse of governmental processes.<sup>108</sup>

Scrutiny of the entry control aspects of motor carrier regulation in Missouri demonstrates how government has been enlisted on the side of cartel enforcement. Intervention by competing carriers into the certification process is virtually automatic. The statutory mandate that "the effect which the proposed transportation service may have upon such carriers" be given "reasonable consideration"<sup>109</sup> is an open invitation to the P.S.C. and certificated intervenors to restrict the supply of motor carrier services and prevent competition. Refusal or failure to procure a certificate of public convenience and necessity is a misdemeanor offense<sup>110</sup> and subjects the actor to a "penalty of not less than \$100 or more than \$2,000 for each offense."<sup>111</sup> In the case of a continuing violation, each day's continuance is a separate and distinct offense.<sup>112</sup>

The quantitative effects of Missouri's motor carrier cartel enforcement scheme are difficult to measure because of crucial gaps in the data.<sup>113</sup> The one solid piece of information available from the P.S.C. is the time differential between contested and uncontested proceedings. Where competing or potentially competing carriers do not intervene, the average length of time between the filing of a certificate application and its grant or denial is ninety days. When intervention occurs, the average period is six to twelve months.<sup>114</sup>

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108. R. BORK, *supra* note 51, at 348.

109. MO. REV. STAT. § 390.051.6 (1978).

110. *Id.* § 390.171.

111. *Id.* § 390.176.

112. *Id.* § 390.176.2.

113. The Commission's Transportation Division does not maintain the following records: (1) the number or percentage of operating authority requests contested by intervening common or contract carriers for the last five years, (2) the quantity or percentage of contested operating authority requests granted or denied, and (3) data on the percentage of intrastate traffic exempt from entry and rate regulation. Letter from Arthur L. Conover, Director of Transportation, Missouri Public Service Commission, to the Author (Oct. 21, 1981). Contrast this with the Florida Public Service Commission, which kept detailed records of the disposition of both common and contract carrier applications for each year of a five-year period beginning in 1974. These records set out the total applications filed each year including new applications and applications for extended authority, the number and percentage granted as filed, the number and percentage granted with modifications, the number and percentage withdrawn, and the number and percentage denied. See Deffenbaugh & Hayman, *Motor Carrier Deregulation in Florida: Before, During and After*, 8 FLA. ST. U.L. REV. 681, 690-91 (1980).

114. This information was supplied by the Transportation Division of the Missouri Public Service Commission in response to the following question: What

It should be emphasized that these time periods are limited to proceedings before the P.S.C. itself. Where judicial review of P.S.C. determinations is sought, this time period expands considerably.<sup>115</sup>

The most direct evidence of the anticompetitive consequences of entry regulation is the fact that the certificate of public convenience and necessity is an asset that can be bought and sold for a large amount of money.<sup>116</sup> In fact, the transferability of the certificates is expressly recognized by section 390.111 of the Missouri Bus and Truck Law.<sup>117</sup> These certificates have market value due to the entry barrier created by certification.<sup>118</sup> As a result of the carrier scarcity imposed by entry regulation, the investment value of intrastate operating rights is nothing more than capitalized monopoly rent.<sup>119</sup> Abolition of entry regulation would not only limit the portion of certificate value that arises from this scarcity but might also increase legitimate business goodwill in the industry, because motor carriers would become more dependent on it and would be forced to put more effort into achieving and retaining customer loyalty.<sup>120</sup>

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is the average length of time between the filing of a request for a certificate of public convenience and necessity and its grant or denial by the P.S.C. (a) where competing or potentially competing carriers do not intervene, and (b) where such carriers do intervene? Letter, *supra* note 113.

115. Two recent cases are illustrative. In *State ex rel. Twehous Excavating Co. v. Public Serv. Comm'n*, 617 S.W.2d 104 (Mo. App., W.D. 1981), the applicant filed for operating authority in mid-September 1976. The appellate court opinion was handed down May 19, 1981. Similarly, in *State ex rel. Inman Freight System v. Public Serv. Comm'n*, 600 S.W.2d 650 (Mo. App., W.D. 1980), the time period between the filing of the application and the ultimate disposition in the court of appeals was four and a half years.

116. The monopoly profits generated by entry and rate regulation are capitalized into the market value of operating certificates. In a market where free bidding for the acquisition by one carrier of another's operating rights is possible, the price paid "tends to equal the present value of the future stream of monopoly profits which the acquiring firm expects to receive from operating in an environment where competition is suppressed." D. Breen, *supra* note 50, at 32. The value of the certificates, then, provides a basis for quantifying the costs to society of cartel enforcement in the motor carrier industry. John Snow and Stephen Sobotka estimate that \$600 million worth of interstate certificates had been transacted by 1977, and that the total value of pre-deregulation certificates was \$3-4 billion. See Snow & Sobotka, *Certificate Values*, in *REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION* 153, 153 (P. MacAvoy & J. Snow ed. 1977).

117. MO. REV. STAT. § 390.111 (1978).

118. Snow & Sobotka, *supra* note 116, at 153.

119. See Sims, *supra* note 37, at 973.

120. One of the few constructive provisions of the Missouri Bus and Truck Law is contained in MO. REV. STAT. § 390.111 (1978):

[N]o right, privilege, or permit granted or obtained under or by virtue of sections 390.111 to 390.176 shall ever be construed as a vested right, privilege or permit; and the general assembly retains full legislative power

C. *Entry and Rate Regulation: Productive Inefficiency*

Thus far, we have focused on the traditionally recognized allocative efficiency loss caused by entry and rate regulation of intrastate motor carriers. This analysis embraces only part of the identifiable loss to society from this system. Entry regulation and ancillary geographic and commodity market partition create significant productive efficiency losses as well.

A market is considered allocatively efficient if it distributes goods or services to all those who would purchase them at more than the cost of production.<sup>121</sup> This type of efficiency "refers to the placement of resources in the economy" and whether such resources are utilized in tasks "where consumers value their output most."<sup>122</sup> In contrast, productive efficiency refers to the ability of particular firms to effectively use resources to produce goods and services "at the lowest possible average cost."<sup>123</sup> Factors contributing to productive efficiency include scale economies, specialization of function, technological innovation, access to capital, and less tangible inputs such as management expertise and worker motivation.<sup>124</sup> In essence, any activity by a firm which reduces costs will enhance productive efficiency because such reductions free resources to produce elsewhere in the economy.<sup>125</sup>

The importance of productive efficiency is illustrated by studies which

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over, concerning and pertaining to the subject or subjects legislated upon in sections 390.111 to 390.176 and the power and right to alter, amend or repeal sections 390.111 to 390.176 at its pleasure.

This provision may become important if Missouri deregulates motor carriers and the trucking companies attempt to obtain compensation for the lost monopoly value of their operating rights. Such a proposal has been made in Note, *Motor Carrier Act of 1980: Toward Compensating Trucking Companies for the Loss of the Monopolistic Value of Their Operating Rights*, 34 VAND. L. REV. 395 (1981), in which the author asserts, "Unless Congress or the judiciary compensates the trucking industry for its losses [from deregulation], the Motor Carrier Act of 1980 treads close to robbery." *Id.* at 430. This proposal not only has the effect of penalizing consumers for their political decision to stop paying monopoly premiums resulting from entry and rate regulation, but also creates all kinds of interesting possibilities for interest groups who suffer adverse economic effects from legislative action. When we consider that no motor carrier statute creates an express right to monopoly profits, the normative judgment that deregulation is a form of "robbery" is rather astonishing. For a good discussion of the nature of certificate values, see Snow and Sobotka, *supra* note 116, at 153-56.

121. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 298 (1981).

122. R. BORK, *supra* note 51, at 91.

123. Easterbrook, *supra* note 121, at 298.

124. R. BORK, *supra* note 51, at 105. See also Leibenstein, *Allocative Efficiency v. X-Efficiency*, 56 AM. ECON. REV. 392 (1966); Liebenstein, *Microeconomics and X-Efficiency Theory*, in THE CRISIS IN ECONOMIC THEORY 97 (D. Bell & I. Kristol ed. 1981).

125. R. BORK, *supra* note 51, at 108.

compare the theoretical tradeoffs when market dominance is achieved by cost-saving. Although an increase in market power may produce some allocative inefficiency, the accompanying increase in productive efficiency will generally exceed the loss produced by expulsion of inefficient rivals from the relevant market.<sup>126</sup> This is because allocative inefficiency is limited to the range between competitive output and reduced monopoly output, while productive efficiency takes place over the entire range of output.<sup>127</sup>

Scrutiny of the motor carrier industry reveals no potentially vexatious tradeoffs between productive and allocative efficiency losses because the present entry control mechanism creates both. These losses are caused by both the threshold certification entry barrier and the operating constraints placed on certificated carriers.

### 1. Threshold Entry Barrier

A survey of the literature of industrial organization supports the proposition that competition encourages cost efficiency.<sup>128</sup> This occurs for two reasons: (1) the information conveyed by lower profit rates alerts a firm that it is operating inefficiently and prompts cost-saving, and (2) free information on production techniques increases with the level of competition, reducing costs of locating more efficient technologies to individual firms.<sup>129</sup>

A study of the gymnasium seating, rock salt, and structural steel industries found cost reductions as high as twenty-three percent after price-fixing conspiracies were terminated.<sup>130</sup> A study of commercial banks found that monopolistic banks had higher labor expenses and larger staffs than banks in more competitive environments.<sup>131</sup> Even in the case of electric utilities, which are described as natural monopolies by some economists, Walter Primeaux has demonstrated that duopoly markets have cost levels

126. Oliver Williamson has pointed out that a relatively modest cost reduction is sufficient to offset relatively large price increases even where there is a high elasticity of demand. He estimates that if a merger reduces costs 5-10%, the merger must yield price increases exceeding 20% under upper bound elasticity of demand levels. See Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21-23 (1968). This complicates the legal assessment of mergers under the antitrust laws because it emphasizes the need to consider whether productive efficiencies yielded by a merger outweigh the allocative efficiency losses produced by an increase in market power. See also Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977).

127. Easterbrook, *supra* note 121, at 301.

128. For a good overview of this literature, see generally Siegfried & Wheeler, *Cost Efficiency and Monopoly Power: A Survey*, Q. REV. ECON. & BUS., Spring 1981, at 25.

129. McCain, *Competition, Information, Redundancy: X-Efficiency and the Cybernetics of the Firm*, 28 KYKLOS 286, 286-308 (1975).

130. Erickson, *Price Fixing Conspiracies: Their Long Term Impact*, 24 J. IND. ECON. 189, 189-202 (1976).

131. Edwards, *Managerial Objectives in Regulated Industries: Expense Preference Behavior in Banking*, 85 J. POL. ECON. 147, 147-62 (1977).

approximately 11.7 percent below those in monopoly markets.<sup>132</sup> The same studies also show that the impact of competition on productive efficiency is greater on small firms than on similarly situated larger firms.<sup>133</sup> This suggests that in the motor carrier industry, where size does not yield natural monopoly scale economies, the effect of competition on cost reduction will be significant.

The negative impact on productive efficiency caused by entry control is predictable. We have seen that one of the factors mandated by statute for consideration in the certification decision is the effect of new entry on existing motor carriers.<sup>134</sup> Nothing in creditable economic theory suggests that this requirement serves any purpose but to restrict competition and derivative output. Certificated firms are the principal means for enforcing this provision, and this guarantees that contested entry decisions will *not* be based on marketplace efficiency considerations. To the extent new firms are barred from entry, firms already in possession of operating authority will lack the incentive to cut costs and lower the average industry cost level.<sup>135</sup>

## 2. Productive Efficiency

The Missouri Bus and Truck Law recognizes two types of geographic route authority: regular and irregular. A regular route is "a fixed, specific and determined course to be traveled by a motor carrier's vehicle rendering service to, from or between various points, localities or municipalities in this state."<sup>136</sup> The term irregular route means that "the course or line of travel to be used by a motor carrier's vehicle in the service is not restricted to any specific route or routes within the area which [the] motor carrier is authorized to serve."<sup>137</sup> Pursuant to its general regulatory authority, the

132. Primeaux, *Some Problems with Natural Monopoly*, 24 ANTITRUST BULL. 63, 76 (1979); Primeaux, *An Assessment of X-Efficiency Gained Through Competition*, 59 REV. ECON. & STAT. 105, 105-08 (1977).

133. Primeaux, *An Assessment of X-Efficiency Gained Through Competition*, 59 REV. ECON. & STAT. 105, 105-08 (1977).

134. MO. REV. STAT. § 390.051.6 (1978).

135. See Leibenstein, *Competition and X-Efficiency: A Reply*, 81 J. POL. ECON. 765, 765-77 (1973).

136. MO. REV. STAT. § 390.020.15 (1978).

137. *Id.* § 390.020.8. In *State ex rel. Beaufort Transfer v. Public Serv. Comm'n*, 610 S.W.2d 96 (Mo. App., W.D. 1980), the court discussed the difference between regular and irregular routes:

Under a regular route, as the name implies, points of origin and destination as well as intermediate route points are specified in the notice of authority. The regular route carrier must also adhere to a particular highway pattern of travel. Irregular routes, by contrast, set no advance path of transit but under an irregular authority the carrier provides service between its operating base and any point in Missouri subject to the restriction that irregular carriers may not compete with regular carriers over routes assigned to them.



P.S.C. has promulgated a number of service classifications. In addition to general commodity carriers, who truck the bulk of intrastate consumer goods, the Transportation Division has established the following categories: (1) common carriers of passengers in school bus-type equipment, (2) carriers of bulk commodities in dump trucks, and (3) common carriers of household goods.<sup>138</sup>

The limitations on route and service authority of common carriers limit competition by impeding entry into alternative geographic and service markets. Such restrictions also contribute to inefficiency if shippers cannot make route and commodity decisions based on marketplace demand. Where these restrictions limit the type of cargo a firm can haul, carriers with this authority are prohibited from loading up with other cargo even if they would incur little additional cost.<sup>139</sup>

The P.S.C. defends the regular-irregular distinction by pointing out that holders of regular routes are obligated to serve those routes "in times of famine as well as in times of plenty."<sup>140</sup> The doubtful benefits conferred on the public by the common carrier obligation are discussed later.<sup>141</sup> What is certain is that this restriction denies to shippers located on regular routes the economic benefits of time and route flexibility obtainable from irregular route carriage.

Route restrictions also promote inefficiency by encouraging excessive "interlining."<sup>142</sup> Where no carrier has the necessary certificate authority to carry a shipment its full distance, multiple carriers deliver the cargo by transferring it at selected exchange points along the way. This practice raises transportation costs, increases transit time, and adds to distribution costs.<sup>143</sup>

The inefficiencies created by service and route restrictions are not limited to regulated carriers. Many enterprises have their own truck fleets for the delivery of goods they produce or equipment they use. The markets for these finished products seldom correspond to the geographic location of suppliers of raw materials. The shipper is generally unable to fill his truck with his own goods on both legs of a round trip.<sup>144</sup> Due to the relatively fixed costs incurred, it would be economical to ship goods both ways. Such efforts are thwarted by route and commodity restrictions which may also have the effect of making private carriage exceed the cost of hiring a regulated carrier.<sup>145</sup>

## V. THE ROLE OF THE COURTS

While it is true that the expertise of the P.S.C. in making proconsumer entry decisions hardly inspires confidence, it is at least as disturbing to observe

138. See 4 MO. CODE ST. REGS. 240-110.060.

139. Snow, *supra* note 68, at 21.

140. *In re Ben Gutman Truck Serv.*, 20 P.S.C. 198, 200-01 (1933).

141. See Part VII.D. *infra*.

142. This practice is regulated by MO. REV. STAT. § 390.116 (1978).

143. Snow, *supra* note 68, at 22.

144. Calof, *supra* note 73, at 1207.

145. *Id.*

the frequency with which the reported appellate court decisions have overturned procompetitive determinations by that agency. One of the more unfortunate aspects of Missouri's motor carrier entry and rate control system is the degree to which the courts have been enlisted in the task of cartel enforcement. A survey of the decisional law reveals that this role is harmful to both consumer welfare and the integrity of judicial institutions.

In *National Trailer Convoy v. Public Service Commission*,<sup>146</sup> the P.S.C. had granted a certificate permitting a shipper to transport house trailers "irrespective of the location of such points on the routes of regular motor carriers."<sup>147</sup> After this order was affirmed by the Cole County Circuit Court, the intervenor-protestants appealed. Citing the conventional standard of review—that it could not substitute its judgment for that of the agency—the court of appeals reversed on the ground that the evidence was insufficient to show either a need for an additional carrier or that the applicant would not have a significant effect on the businesses of other authorized carriers.<sup>148</sup> The court stated:

Neither is there any competent or substantial evidence to negative the positive evidence offered by the appellants, that the grant of the certificate of convenience and necessity to Wade would adversely affect their business and the service presently being furnished by them to the public. Indeed, the overwhelming evidence clearly establishes that such adverse effect would result from the certification.<sup>149</sup>

A similar result was obtained in *State ex rel. Orscheln Brothers Truck Lines v. Public Service Commission*.<sup>150</sup> This case arose from an application for an operating certificate by Railway Express Agency (REA) to transport "general commodities moving in express service between Kansas City and St. Louis"<sup>151</sup> as well as several intermediate and off-route points along U.S. Highways 40 and 50. The court of appeals reversed both the P.S.C. and the circuit court and held that granting the certificate to REA was "not supported by competent and substantial evidence upon the whole record."<sup>152</sup> In essence, the court objected to the fact that REA proposed a completely new line-haul service, while in the past it had "merely collected the freight from various shippers and . . . shipped the various items of freight in aggregate by the railroads . . . [and] distributed and delivered the freight to the various consignees."<sup>153</sup>

*State ex rel. Oliver v. Public Service Commission*<sup>154</sup> involved an application

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146. 488 S.W.2d 942 (Mo. App., K.C. 1972).

147. *Id.* at 943.

148. *Id.* at 948.

149. *Id.*

150. 433 S.W.2d 596 (Mo. App., K.C. 1968).

151. *Id.* at 597.

152. *Id.* at 604.

153. *Id.*

154. 542 S.W.2d 595 (Mo. App., K.C. 1976).

by a bulk commodity carrier (Hardy) "for additional authority to haul heavy equipment, machinery and commodities for others over irregular routes."<sup>155</sup> Hardy was engaged in the heavy construction business and required special road equipment. The equipment was in use only about thirty percent of the time.<sup>156</sup> The application was an economically sensible attempt to defray fixed costs by making more use of the assets. The grant of authority would have been a social welfare gain because resources would not sit idle.<sup>157</sup>

Five other carriers filed applications protesting the grant of authority to Hardy. After an evidentiary hearing was held on Hardy's application, the P.S.C. granted a part of the authority sought. The intervening carriers appealed and the Cole County Circuit Court reversed the P.S.C. on the ground that the partial grant was not supported by competent and substantial evidence on the whole record.<sup>158</sup> The court of appeals affirmed, in a protectionist opinion characteristic of the reported decisions. There was testimony by three potential customers in support of the application, but the court held this outweighed by the need to protect the protesting intervenors—in spite of the fact that none of the principal intervenors had ever been contacted by any of the shippers who testified in support of Hardy.<sup>159</sup>

The assault on consumer welfare posed by the decisional law is not limited to the intervention aspects of acquiring a certificate of public convenience and necessity. Some of the most depressing case law has resulted from the combined efforts of the P.S.C. and the appellate courts. In *State ex rel. Philipp Transfer Lines v. Public Service Commission*<sup>160</sup> (*Philipp II*), Philipp Transfer Lines (Transfer) and Philipp Transit Lines (Transit) filed a supplement to the Midwest Motor Freight Bureau Common Carrier Tariff offering "through service at joint rates to and from numerous points of origin and destination" in Missouri,<sup>161</sup> pursuant to Missouri Revised Statutes section 390.116.<sup>162</sup> The proposal was to combine "two irregular routes or . . . an irregular route with a regular route to accomplish interlining joint carriage."<sup>163</sup> This request provoked the intervention of eleven carriers who would be in possible competition with Transfer or Transit in areas affected by the tariff.<sup>164</sup> After hearing, the P.S.C. rejected the supplement.<sup>165</sup> Its order was affirmed by the Cole County Circuit Court and further review was sought in the Missouri Court of Appeals for the Western District.

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155. *Id.* at 597.

156. *Id.* at 599.

157. *See* Part III.A. *supra*.

158. 542 S.W.2d at 597.

159. *Id.* at 601.

160. 599 S.W.2d 82 (Mo. App., W.D. 1980).

161. *Id.* at 83.

162. (1978).

163. 599 S.W.2d at 84-85.

164. *Id.* at 83.

165. *Id.*

The principal argument advanced by the P.S.C. was that the appellants could not benefit from section 390.116, which allows interlining carriers to establish "reasonable through routes and joint rates,"<sup>166</sup> because that statute is limited to joint combinations of "regular" route authority. In contrast, "irregular" authority is not "route" authority in the strict sense because it authorizes area service, i.e., from a base area to any point in the state which the shipper selects along courses of travel that vary depending on the destination.<sup>167</sup> The P.S.C. argued that to allow interlining between regular routes, or irregular routes in combination with regular routes, would result in "the creation by the joint tariff of a regular route in contravention of exclusive Commission authority on the subject."<sup>168</sup> In essence, the P.S.C. feared that the appellants were embarking on an activity which would allow evasion of the certification process.

The procompetitive implications of the appellants' supplement tariff were further underscored by the arguments advanced by the intervening carriers. In the words of the court:

Intervenors, the competing motor carriers, join in the arguments advanced by the Commission, and also contend that the proposed interlining will permit Transfer and Transit to compete with regular route carriers by duplicating regular route service and yet enjoy the advantage of call and demand service characteristic of irregular route certification. *This, they say, will divert shipments from the regular carriers to their economic loss* and will undermine the concept of dependable service available to the public on the schedules which assure motor freight transport on regular routes. Additionally, it is argued that the net consequence would be a proliferation of routes for which no necessity has been demonstrated.<sup>169</sup>

The P.S.C. and its certificated clientele may have been alarmed by two prior decisions that potentially weakened cartel enforcement. In *State ex rel. Philipp P.L. v. Public Service Commission*<sup>170</sup> (*Philipp I*), the court of appeals held that the power to establish through routes is vested in the carriers and that the P.S.C. lacked jurisdiction to determine whether such routes were reasonable.<sup>171</sup> In *State ex rel. Beaufort Transfer v. Public Service Commission*,<sup>172</sup> the court held that competing carriers had no right to a hearing or to intervention in proceedings to transfer or sell certificate authority.<sup>173</sup> Both decisions had a potentially salutary effect on competition because they limited the ability of the P.S.C. to prevent entry into new geographic markets and

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166. MO. REV. STAT. § 390.116 (1978).

167. 599 S.W.2d at 85.

168. *Id.*

169. *Id.* at 85-86 (emphasis added).

170. 523 S.W.2d 353 (Mo. App., K.C. 1975).

171. *Id.* at 356.

172. 593 S.W.2d 241 (Mo. App., W.D. 1979).

173. *Id.* at 249. The certificates are salable under MO. REV. STAT. § 390.111 (1978). See text accompanying notes 116-20 *supra*.

the ability of competing carriers to impede new entry based on certificate transfer or sale.

In *Philipp II*, however, the court of appeals reverted to an anticompetitive construction of the motor carrier regulatory scheme. In the course of refusing to allow discretionary interlining, the court rejected the I.C.C.'s practice of "permitting joint service regardless of whether the combination is of regular or irregular routes, as long as the certificates contained no express restrictions to the contrary."<sup>174</sup> The court observed that the nature of irregular routes, which are not limited to established pathways or destinations, precluded P.S.C. control over what routes might evolve if combinations involving irregular routes were allowed. The court expressed concern that "the interchange of freight between regular and irregular routes permits the regular route carrier to reach points of destination in the state for which it has shown no public need and effectively extends the regular carriers route without the control of Commission certification."<sup>175</sup>

The court also grounded its decision on section 390.051.8 of the Missouri Bus and Truck Law, which reads:

It shall be unlawful for any common carrier, except one having a certificate authorizing such service, to accept persons or property for transportation between points on the route of a regular route common carrier or between points on the routes of two or more regular route common carriers where through or joint service has been authorized or established between such regular route common carriers.<sup>176</sup>

The opinion interpreted this language as prohibiting certificated irregular route carriers from transporting goods between points on the route of a regular route or joint service common carrier. The court justified this interpretation by citing with favor language from an Ohio decision that reached a similar protectionist result: "In the view of the commission, the proposals here made, if allowed to go into effect, would completely disrupt the system of regulation which has been functioning for many years, and under which the motor carriers of this state have developed their service and facilities in competitive balance."<sup>177</sup>

The unifying theme of the reported decisions is the protectionist function of the certification process. Government regulatory policy should encourage economic efficiency and thereby maximize consumer welfare. To be concerned with whether new entry into the motor carrier industry will

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174. 599 S.W.2d at 86.

175. *Id.* at 87. In a statement that can only be described as perverse in light of the actual effects of entry and rate regulation, the *Philipp II* court asserts: "Such rules are essential to the authority of the Commission to control service in the public interest." *Id.* at 88.

176. MO. REV. STAT. § 390.051.8 (1978).

177. 599 S.W.2d at 88 (quoting *E. A. Schlairet Transfer Co. v. Public Utilities Comm'n*, 174 Ohio St. 554, 557, 190 N.E.2d 910, 912 (1963)).

“divert business” from existing carriers is both irrelevant to sound economic policy and antithetical to consumer welfare.

This criticism should not be construed as an argument that proper supervision of entry and rate regulation could increase consumer welfare. Such marketplace intrusion has inherent anticompetitive consequences, and no court decision can convert this government-sanctioned cartel into a system capable of operating in the public interest. Even where agency and judicial decisionmaking is arguably procompetitive, the delay and cost imposed by the certification process deters many who would otherwise be capable of providing carrier service.

The courts should stop attempting to rationalize an indefensible regulatory system. This can be accomplished, in part, by refusing to enforce anticompetitive P.S.C. actions that lack express legislative support.<sup>178</sup> There is abundant case law establishing competition as a factor to be considered in motor carrier entry decisions.<sup>179</sup> At the very least, Missouri courts should resist the impulse to exalt the policy errors of other jurisdictions.

## VI. COMPARATIVE COSTS OF ENTRY AND RATE REGULATION

This Article has pointed out the economic flaws inherent in entry and rate regulation of the motor carrier industry. How much does this regulation cost consumers? Studies at the national, international, and state levels provide some answers.

### A. *National Studies*

Some of the earliest evidence of the effect of entry and rate regulation on motor carrier pricing appeared in the 1950's, when various agricultural commodities were exempted from I.C.C. regulation. The United States Department of Agriculture found that rates for fresh and frozen poultry declined thirty-three percent and thirty-six percent, respectively, after they were deregulated in 1952.<sup>180</sup> The same study also found that types of services offered expanded, quality of services improved, schedules became more

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178. Judicial review of P.S.C. determinations is limited to whether there is “substantial evidence” to support the agency’s decision. *State ex rel. Churchill Truck Lines v. Public Serv. Comm’n*, 555 S.W.2d 328, 335 (Mo. App., K.C. 1977). This limited review function bars the court from trying cases de novo and weighing the evidence. *State ex rel. Crown Coach Co. v. Public Serv. Comm’n*, 238 Mo. App. 287, 302, 179 S.W.2d 123, 130 (K.C. 1944). Thus, reviewing courts are prohibited from substituting their judgments as to facts for those of the P.S.C. and must limit their review to whether the P.S.C. could have reasonably made its findings and reached its results on consideration of all of the evidence before it. *State ex rel. Oliver v. Public Serv. Comm’n*, 542 S.W.2d 595, 598 (Mo. App., K.C. 1976).

179. See, e.g., *Sharron Motor Lines v. United States*, 633 F.2d 1115, 1117-18 (5th Cir. 1981); *Niedert Motor Serv. v. United States*, 583 F.2d 954, 963 (7th Cir. 1978).

180. *Jordan*, *supra* note 81, at 166.

convenient, and in-transit motor time was reduced.<sup>181</sup> Not only were trucks readily available, but there was an increased willingness to haul less than full loads, make multiple pickup and delivery stops, make mid-route destination changes, and serve thinly populated, out-of-the-way locations.<sup>182</sup> A similar result occurred when frozen fruits and vegetables were exempted in 1956. At a time when rail rates for these products increased from six to fourteen percent, the weighted average motor carrier rates for hauling these items declined nineteen percent after deregulation.<sup>183</sup>

In March 1982, the first comprehensive evaluation of the 1980 deregulation provisions was submitted to the Motor Carrier Ratemaking Study Commission by the Bureau of Economics of the Federal Trade Commission.<sup>184</sup> The principal focus of the report was the effect of the liberalized entry and rate setting provisions of the Motor Carrier Act of 1980.<sup>185</sup> The report found that a variety of rate discounts have appeared since deregulation. These range from across-the-board percentage reductions of ten to fifteen percent to more selective multiple tender rates<sup>186</sup> and promotional discounts.<sup>187</sup> Not only have numerous carriers filed discount tariffs with the I.C.C. for specifically named shippers but some carriers have chosen to reduce rates indirectly "by improving the quality of service offered at current rates."<sup>188</sup> The net result of this combination of improved service and rate-cutting is that shippers will have more diversified price/service options from which to choose.

The report observed that, while nominal trucking rates continued to rise

181. T. MOORE, TRUCKING REGULATION: LESSONS FROM EUROPE 140-41 (1976).

182. Snow, *supra* note 68, at 13.

183. T. MOORE, *supra* note 181, at 139-40.

184. D. Breen, *supra* note 50. The Ratemaking Study Commission was established by Congress "to investigate collective ratemaking and determine whether antitrust immunity for the collective determination of trucking rates should continue." *Id.* at 1.

185. In the Motor Carrier Act of 1980, Congress directed the I.C.C. to purge unnecessary geographic and commodity restrictions and to establish procedures that would promote the expeditious consideration of requests for operating authority. The Act liberalizes entry requirements and shifts to protesting carriers the burden of proving that the proposed service would be inconsistent with the public convenience and necessity. The Act also allows carriers to raise or lower rates by as much as 10% without permission from the I.C.C. See 49 U.S.C. §§ 10708(d), 10922 (Supp. IV 1980).

186. Multiple tender rates are discounts provided "when separate shipments are tendered for pickup at the same time with the size of the discount depending on the aggregate weight involved." D. Breen, *supra* note 50, at 25.

187. Promotional discounts are generally offered in order to establish a competitive toehold in a particular market. For example, Roadway Express has offered promotional discounts to build up business in its new northwest marketing territory. *Id.*

188. *Id.* at 26. The example provided by the report is one company that offers "guaranteed delivery with penalties ranging up to 20 percent for delayed service."

faster than the rate of inflation in the year after passage of the Act, rate discounting reduced the increase to twelve percent, or the approximate rate of inflation for the economy as a whole during that period.<sup>189</sup> "Overall," concluded the report, "the evidence suggests that regulatory reform has served to restrain rate increases in the trucking industry."<sup>190</sup>

### B. *International Studies*

Studies of systems in other countries have shown similar results. A statistical evaluation of Canadian motor carrier entry and rate regulation found that revenues per ton-mile of unregulated trucking were 6.73 percent lower than revenues per ton-mile in regulated areas<sup>191</sup> and that rates in provinces without regulation were approximately nine to twelve percent lower than in regulated provinces.<sup>192</sup>

One of the most comprehensive international comparisons embraced five European countries (Great Britain, West Germany, Belgium, the Netherlands, and Sweden) and supports the conclusion that regulation reduces efficiency, increases rates, and impedes the quality of service.<sup>193</sup> Based on 1973 freight rates, it was found that in West Germany, with the most heavily regulated motor carrier industry,<sup>194</sup> the rate per ton-mile was over fifty percent higher than in any other European country.<sup>195</sup> After the British motor carrier industry was deregulated in 1971, a real reduction in motor rates occurred, while West German rates increased.<sup>196</sup>

### C. *State Studies*

Studies from other states support these findings. An analysis of the essen-

189. *Id.* at 27.

190. *Id.*

191. Sloss, *Regulation of Motor Carrier Freight Transportation: A Quantitative Evaluation of Policy*, 1 BELL J. ECON. & MGMT SCI. 327, 351 (1970). As Moore points out, Sloss may actually have underestimated the difference:

First, Sloss lumped all "regulated" in Canada with the United States. Regulation is considerably more comprehensive in the United States than in any province of Canada. In fact, one of his "regulated" provinces—British Columbia—does not, according to extraprovincial carriers, regulate rates. On the other hand, several provinces in the "unregulated" area do require the publication of rates and adherence to them, so that much of the "unregulated" sector is controlled in some way. Moreover, if regulation raised rates an average of 20 percent, those rates that went up the most would be expected on average to lead to the greatest reduction in traffic. As a consequence revenues per ton-mile would be expected to rise by much less than 20 percent.

T. MOORE, *supra* note 181, at 141.

192. See Jordan, *supra* note 81, at 166.

193. T. MOORE, *supra* note 181.

194. *Id.* at 122.

195. *Id.* at 128.

196. *Id.*



tially unregulated<sup>197</sup> intrastate motor carrier industry in New Jersey concluded that unregulated intrastate rates were lower than I.C.C. regulated rates for comparable commodities, distances, and weights.<sup>198</sup> The mean range of intrastate savings for large shippers was 9.7 to 15.2 percent less than would have been paid under the interstate Mid-Atlantic Motor Carrier Tariff.<sup>199</sup> The range of savings for small shippers was somewhat less,<sup>200</sup> due partly to lack of knowledge concerning rate alternatives to the Mid-Atlantic tariff.<sup>201</sup>

The implied linkage between lower costs and an unregulated motor carrier environment was strengthened by two other findings. First, lower rate intrastate carriers were found to have lower operating ratios<sup>202</sup> than carriers certified by the I.C.C.,<sup>203</sup> indicating that costs are lower in the absence of entry, rate, and operating constraints.<sup>204</sup> Second, the shippers who benefit most directly from lower rates overwhelmingly preferred New Jersey's unregulated motor carrier environment over I.C.C.-type regulation,<sup>205</sup> while among small shippers, a slightly smaller eighty-nine percent favored keeping the state unregulated.<sup>206</sup>

One of the most recent assessments of the costs of intrastate motor carrier regulation examined the regulatory system in Kansas<sup>207</sup> to determine whether the Kansas Corporation Commission should continue to operate.<sup>208</sup>

197. Household goods movers, solid waste haulers, and bulk commodity carriers are subject to a limited amount of state regulation in areas such as safety and consumer protection. None of these carrier classifications are comprehensively regulated in the entry and rate control sense.

198. Allen, Lonergan & Plane, Examination of the Unregulated Trucking Experience in New Jersey 166-67, (December 1979) (available through Nat'l Technical Information Svc., Springfield, Va. 22161).

199. *Id.* at 179.

200. *Id.*

201. *Id.* In some instances, rates 30-60% below regulated rates were negotiated by shippers in the unregulated intrastate market.

202. Carrier operating ratios are computed by dividing expenses by revenues. Low operating ratios are generally cited as an indicator of superior efficiency.

203. New Jersey motor carriers operating strictly intrastate were found to have lower operating ratios (88.11) than I.C.C. certificated carriers operating in the intrastate New Jersey market (95.92). Allen, Lonergan & Plane, *supra* note 198, at 175.

204. *Id.* at 180. The authors were careful to point out that it was unclear whether lower costs in intrastate markets were due to the absence of an institutional constraint, i.e., organized labor.

205. *Id.* at 178-79. In addition, 97% of all shippers contacted thought intrastate service levels were better than or equal to interstate service levels. *Id.* at 182.

206. *Id.* at 178-79.

207. State of Kansas, Legislative Division of Post Audit, Sunset Audit Report—Kansas Corporation Commission Motor Carrier Regulatory Program (September 25, 1981) [hereinafter cited as Audit Report].

208. The report was prepared pursuant to the Kansas Sunset Law, KAN. STAT. ANN. §§ 74-7226, -7237 (1980). See Audit Report, *supra* note 207, at S-1.

The report estimated both the direct costs imposed by route, equipment, and commodity restrictions and the wealth transfer produced by rate bureau cartel pricing.<sup>209</sup> To measure these balance sheet costs, the auditors selected four commodity classifications—general commodities, livestock, certain petroleum products, and household goods—which account for about thirty-four percent of the dollar value of all intrastate shipping traffic in Kansas.<sup>210</sup> Regulated rates for the selected commodities were compared with rates for the same commodities in unregulated jurisdictions. The report concluded that the total direct cost to Kansas shippers from operating inefficiencies, administrative costs, and direct compliance costs was \$19 million.<sup>211</sup>

The report recommended abolition of entry and rate regulation and enactment of legislation to make rate bureaus subject to the antitrust laws.<sup>212</sup> Although new legislation is probably not necessary to successfully prosecute horizontal price-fixing by rate bureaus or their commodity-based equivalents<sup>213</sup> in Missouri, legislation may be necessary to attack the whole range of anticompetitive activity<sup>214</sup> and to catalyze timid state antitrust enforcement.<sup>215</sup>

#### D. Summary

The net economic result of entry and rate regulation in the motor carrier industry is allocative and productive inefficiency. If the results of studies in other jurisdictions are any guide, this regulation costs the citizens of Missouri millions of dollars annually.

The partial deregulation of the interstate motor carrier industry was largely a response to findings that federal entry and rate-making controls were costing consumers billions of dollars a year.<sup>216</sup> Such findings no doubt

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209. Audit Report, *supra* note 207, at 40-45.

210. *Id.* at 41.

211. *Id.*

212. *Id.*

213. In Missouri, these are referred to as service classifications. See 4 MO. CODE ST. REG. 240-110.060.

214. The right of competitors to intervene in the certification process invites collusive non-price activity harmful to competition. This could take the form of agreements among certificated carriers to oppose applications for route authority. See *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 674 F.2d 1252 (9th Cir. 1982) (antitrust action attacking such agreements).

215. Recent pronouncements from the Missouri Attorney General suggest that this should not be a major problem. See generally Ashcroft, *A Renewed Commitment to State Antitrust Enforcement and a State Policy of Competition: The Missouri Experience*, 46 MO. L. REV. 469 (1981).

216. See generally T. MOORE, FREIGHT TRANSPORTATION REGULATION 80 (1972). More recently, in an application of regression analysis to operating certificate values, James Frew noted:

[T]he present regulatory environment has resulted in a schedule of freight rates so consistently in excess of costs that monopoly profits can be

influenced the recent decisions of Florida<sup>217</sup> and Arizona<sup>218</sup> to substantially deregulate their indigenous motor carrier industries. The strong theoretical and empirical case against entry and rate control of structurally competitive industries should at least cause the Missouri General Assembly to examine the reasons for the gap between public interest folklore and actual performance of intrastate regulation of motor carriers in Missouri.<sup>219</sup>

## VII. ARGUMENTS FAVORING REGULATION

The failure of motor carrier entry and rate regulation to command the allegiance of reputable economic theory is underscored when we examine the arguments against deregulation advanced by apologists for the motor carrier status quo. None withstands analysis.

### A. *Industrial Concentration*

Opponents of deregulation contend that it would yield destructive rate competition, leading to long-run dominance by a few firms. These remaining firms would use their monopoly positions to increase prices and reduce services at the expense of shippers and consumers.

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estimated for broad certificate classes simply by determining the level of service demand that is present in the service area. . . .

Since shipping rates consistently exceed [noncertificate] costs of shipping, consumers pay higher prices than they would if the services were priced at cost. Motor carriers receive compensation that exceeds the cost of providing the services. As long as rates continue to exceed costs, command over resources is shifted from consumer to producer. Traditional economic theory predicts that rate reductions could be accomplished by eliminating rate bureaus, preventing carriers from colluding to set prices, and eliminating industry-entry restrictions. The Motor Carrier Reform Act of 1980 takes a first step in this direction, and unless economic rents for motor carriers are deemed socially desirable, policies to reduce rents should be continued.

Frew, *The Existence of Monopoly Profits in the Motor Carrier Industry*, 24 J.L. & ECON. 289, 314-15 (1981).

217. Entry and rate regulation of intrastate motor carriers in Florida was repealed on July 1, 1980, by that state's "sunset review" process. See generally Regulatory Reform Act, ch. 76-168, § 3(2)(h), 1976 Fla. Laws 295, 298 (repealing FLA. STAT. ch. 323 (1979)).

218. 1979 Ariz. Sess. Laws 801, ch. 203, § 1 repealed ARIZ. REV. STAT. §§ 40-601 to -620 effective July 1, 1982, contingent on voter approval of an amendment to ARIZ. CONST. art. 15, § 2 removing the power of the Arizona Corporation Commission to regulate motor carriers. That amendment passed on November 4, 1980. See 1981 Ariz. Leg. Serv. A-55 (West).

219. For additional evidence that entry and rate regulation has the effect of cartelizing the trucking industry, see generally Boyer, *Equalizing Discrimination and Cartel Pricing in Transport Rate Regulation*, 89 J. POL. ECON. 270 (1981).

The implausibility of this argument becomes apparent when we recall the structurally competitive tendencies of the motor carrier industry.<sup>220</sup> Left unregulated, this industry is characterized by insignificant economies of scale. If market processes eliminate inefficient firms, low entry barriers make it impossible for the survivors to raise rates above the efficient level. Efforts to do so would attract new entrants into the market, who would undercut attempts by the surviving firms to collect monopoly rents. The irony of the concentration argument is revealed when we consider that the only serious opportunity for realization of such a scenario is through the type of government-sponsored cartel arrangement exemplified by the Missouri Bus and Truck Law.<sup>221</sup>

### B. *Predatory Price-Cutting*

It has long been a staple of populist economics that large firms with extensive financial resources can eliminate competitors by cutting prices.<sup>222</sup> It was through the selective reduction of prices in competitive segments of the petroleum market, financed by higher prices charged in markets where it possessed a monopoly, that the Standard Oil Company allegedly eliminated or forcibly merged with the competition. This activity is thought to have been instrumental in Standard's acquisition of a ninety percent share of the

220. See Part III. *supra*.

221. The fear that deregulation would produce significant industrial concentration in the motor carrier industry is further undermined by the early experience with federal deregulation:

There is no evidence indicating that the passage of the MCA [the Motor Carrier Act of 1980] has moved the truckload sector in the direction of dominance by a few large carriers. . . . With the MCA's relaxation of regulatory barriers there has been an influx of small scale TL competitors and non-union owner operators, in particular, have been able to undercut the rates of large established common carriers on front-haul traffic. Many large common carriers are experiencing declining market shares on TL freight, which suggests that the effect of the MCA may have been to reduce concentration in this sector.

D. Breen, *supra* note 50, at 34-35 (footnote omitted). The report also discusses firms in the less-than-truckload sector, where again there is little evidence that the large carriers are growing at the expense of small carriers.

Large carriers do seem to be expanding but this is being accomplished by entering each other's marketing territories, not via horizontal mergers. . . . This method of expansion may lead to an industry with fewer firms but the evidence to date does not support this proposition. Some small carriers are being forced to leave the industry but an even larger number seem to be entering. Nor is there any evidence that large carriers are systematically underpricing smaller competitors or consistently earning higher profits.

*Id.* at 35-36 (footnote omitted).

222. See generally Dixon, *Price Discrimination and the Sherman Act*, 27 A.B.A. SEC. ANTITRUST L. REP. 14 (1965).

domestic market for refined petroleum products by the time of the 1911 Supreme Court-ordered divestiture.<sup>223</sup> Though this scenario may appeal to those who subscribe to the demonology of predatory capitalism, it is not an intellectually respectable argument in favor of entry and rate regulation of the motor carrier industry.

The first difficulty confronted by legal sanctions against predatory pricing is distinguishing "predatory" pricing from competition on the merits. Efforts to do so have spawned an exhaustive literature.<sup>224</sup> This commentary focuses on how to identify and punish pricing practices that are economically undesirable without discouraging the kind of price competition that enhances consumer welfare.<sup>225</sup> Some commentators doubt this task can be accomplished by the legal system and question the desirability of attempting to do so.<sup>226</sup> Even among those who would impose legal sanctions, there is little agreement. The effort to advance a bright line cost formulation<sup>227</sup> for the identification of predatory pricing has met with a barrage of academic criticism<sup>228</sup> and increased judicial resistance.<sup>229</sup> There is no indication that the Missouri

223. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

224. Recent interest in this topic was generated by Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). See note 228 *infra* for a collection of responsive law review commentary.

225. For a revealing exchange on this subject, see *Debate: Should the Sherman Act be Amended to Broaden the Offense of Attempt to Monopolize?*, 48 ANTITRUST L.J. 1433 (1979).

226. See R. BORK, *supra* note 51, at 342; Easterbrook, *supra* note 121, at 298.

227. See Areeda & Turner, *supra* note 224, at 706. For a later exposition of this proposal, see III P. AREEDA & D. TURNER, ANTITRUST LAW §§ 711-722 (1978).

228. Major critical assessments of the Areeda-Turner approach to cost-based predatory pricing rules include Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Scherer, *Some Last Words on Predatory Pricing*, 89 HARV. L. REV. 901 (1976); Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979).

229. In the recent case of *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1032-36 (9th Cir. 1981), the Ninth Circuit, noting academic criticism of the "average variable cost pricing" test as the conclusive predatory pricing standard, refused to hold that pricing above average variable cost was insulated from antitrust attack:

[T]o establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the

P.S.C. is even attentive to this dialogue, much less willing or capable of identifying the existence of predatory pricing.<sup>230</sup>

The second difficulty with the predatory pricing argument arises from the steadily accumulating evidence that such behavior is extremely rare. Indeed, there is considerable doubt whether the oft-cited *Standard Oil* model describes any real world phenomenon.<sup>231</sup> Under that model, the predator firm uses its deep pocket to finance below-cost sales in order to eliminate competitors. After achieving a monopoly position, the predator recoups its losses by subsequent monopoly pricing.

The problem with this is that predation will likely impose prohibitive costs on the dominant firm, which must forfeit the difference between the competitive and predatory price.<sup>232</sup> Such a strategy will be much more costly to the predator than to its small competitors because the predator will incur a per-sale loss multiplied by the quantity of units sold.<sup>233</sup> Since the price reduction compels the sale of additional units to clear the market, marginal costs will generally be higher for the predator. Firms with the largest market shares will lose money the quickest.<sup>234</sup> When we also consider the numerous survival tactics available to smaller firms,<sup>235</sup> the viability of predatory pricing as a rational strategy for nascent monopolists becomes doubtful.

Predatory pricing is made even more dubious where the relevant market lacks high entry barriers. Unless new entry can be barred, the monopolist will be unable to recoup the losses it sustained in pursuit of monopoly,<sup>236</sup> because any attempt to charge a post-predation monopoly price will attract

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plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

*Id.* at 1035-36.

230. No reported appellate court or Missouri Public Service Commission decision delineates standards to be used in determining the existence of predatory rate-setting.

231. See R. BORK, *supra* note 51, at 146. This position was first elucidated in McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958), and more recently in McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980); Easterbrook, *supra* note 121, at 313-14.

232. Easterbrook, *supra* note 121, at 268.

233. Brodley & Hay, *supra* note 228, at 741.

234. Easterbrook, *supra* note 121, at 268.

235. Among these tactics, Easterbrook includes borrowing sufficient to allow the victim firm to ride out a predatory pricing foray, long term contracts to customers at less than the monopoly price a predator would charge if it drove out competition, and production cutbacks by the victim which compel the predator to satisfy an even larger part of market demand at correspondingly greater losses. *Id.* at 268-76.

236. *Id.* at 271-72.

new entrants.<sup>237</sup> In the absence of regulation, the low entry barriers that characterize the motor carrier industry make it an inhospitable environment for monopoly recoupment of losses incurred from predatory pricing.<sup>238</sup>

Finally, even if a plausible case for predatory pricing can be hypothesized in unregulated motor carrier markets, there is no evidence that the Public Service Commission can address the problem more effectively than conventional antitrust enforcement.<sup>239</sup> Indeed, the fact that the firm targeted for predation will be aware of the downward change in market price makes it the logical candidate for detecting predation and initiating appropriate antitrust enforcement proceedings.<sup>240</sup> This incentive is reinforced by the private treble damage remedy.<sup>241</sup>

### C. Market Chaos

This argument suggests that deregulation would encourage blind, frenzied entry and exit from markets with rapidly fluctuating price and service levels. Shippers and customers would be uncertain as to the availability of particular carriers and the rates charged. Long-run planning would be impossible for both shippers and carriers.<sup>242</sup> Wasteful excess capacity would be encouraged, business failures would be frequent, and the overall motor carrier service market would cease to function.<sup>243</sup> Although this image has a certain intuitive logic for those not familiar with the workings of the unregulated marketplace, it amounts to nothing more than fiction posing as economic theory.

It is important to note that the survival of individual firms is not a gain for consumer welfare if those firms are inefficient and if that inefficiency is preserved through regulation. In a dynamic marketplace, certain kinds of productive capacity will become redundant. The losses resulting from this excess capacity are the means by which information is conveyed that it exists.<sup>244</sup> It is through these losses that an economy allocates resources into more desired activities.<sup>245</sup> Consumer welfare is enhanced by encouraging this kind of resource mobility.

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237. As Easterbrook points out, even if the victim flees the market or declares bankruptcy, the productive assets still exist and await utilization as soon as the predator attempts monopoly recoupment. *Id.*

238. See Part III.B. *supra*.

239. See Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 578 (1979) (structurally competitive markets are particularly good candidates for deregulation with policing by antitrust).

240. Easterbrook, *supra* note 121, at 331.

241. See 15 U.S.C. § 15 (1976 & Supp.IV 1980); MO. REV. STAT. § 416.121 (1978).

242. Snow, *supra* note 68, at 35.

243. *Id.*

244. Calof, *supra* note 73, at 1225.

245. See generally C. KAYSER & D. TURNER, ANTITRUST POLICY 190-205 (1959).

Although the demise of an inefficient firm may create temporary discomfort for its owners and employees, it is nevertheless a net social gain.<sup>246</sup> The failure implicit in the market chaos argument arises from the inability or unwillingness of its proponents to recognize that a comprehensive regulatory scheme is only legitimized to the extent it enhances the welfare of consumers at large. That an unregulated marketplace will cull out inefficient producers is no justification for government intervention; indeed, it is a powerful argument against it.

Even if we assume that "market chaos" describes something about which the law should be concerned, the available empirical data indicates that unregulated motor carriage would be no more "chaotic" than any other competitive market. A study analyzing the market stability of nonregulated agricultural trucking<sup>247</sup> found not only that entry rates were comparable with those of other service businesses, but that the bankruptcy rate of exempt agricultural carriers was actually lower than any of the manufacturing industries and ranked with the lowest in the retail trades.<sup>248</sup> The implications of this study are reinforced by the apparent ability of other markets not subject to entry and rate regulation to function efficiently without "chaos."

Nothing prevents firms in these markets from making long term price and service commitments.<sup>249</sup> The notion that regulation brings some kind of desirable "stability" to the marketplace is further discredited because, as we have seen, conventional market incentives produce service and price responses superior to those available in regulated contexts. "Market chaos" is nothing more than a simplistic metaphor mistakenly assumed to describe

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246. This is true even where a motor carrier firm exits a market by way of bankruptcy:

In the majority of cases, the firms simply discontinue business, discharge employees, sell off assets, and shut down. When this happens the resources formerly used there revert to their next best source of income. Aside from the general state of economy, one of the main determinants of the impact is the mobility of these resources, which in turn depends on their specialization. Other things being equal, the employees of an industry that requires skills specific to that industry will suffer greater decreases in income than the employees of an industry that utilizes easily transferable skills. Similarly, owners of specialized assets locked into specific locations will suffer greater capital losses.

On both counts, relative to other industries, the impact of exits . . . should be minimal. Drivers' skills are easily transferable among all sectors of the motor carrier industry as well as to the private firms. The truck, truck-tractor, and most trailers are neither specialized nor irrevocably committed to specific markets or regions. The existence of a secondhand equipment market allows a greater fraction of the initial investment to be recovered on liquidation.

Miklius & Casavant, *supra* note 107, at 274-75.

247. *Id.* at 271-301.

248. *Id.* at 283.

249. Snow, *supra* note 68, at 35.



the competitive marketplace. Like other myths, it should be consigned to the grave of historical curiosities and resuscitated only for instruction on the pitfalls of regulatory sloganeering.

D. *Protecting Service to Small Communities*

The argument that harmful rate discrimination will ensue from elimination of entry and rate controls is based on two related assumptions. First, since low density rural service is unremunerative, it can only be maintained by subsidization from low cost, high density inter-urban routes. Second, in return for protection from new entrants, certificated carriers are held to a common carrier duty to provide service to high cost, low density rural areas at equalized rates.<sup>250</sup>

The initial fallacy of this argument is the notion that deregulation would provoke a wholesale evacuation of capital from less densely traveled traffic lanes. Carriers who enter deregulated markets already receiving satisfactory service at competitive prices would suppress prices to levels below their costs. In the absence of the monopoly rate-setting encouraged by the regulatory status quo, some carriers would be required to withdraw from these markets and efficient price and service levels would be restored.<sup>251</sup>

Regulation proponents also inaccurately assume that rural carrier service is unable to support itself without a cross-subsidy from high density routes. Not only do the facts resist this assertion, but nothing in the Missouri Bus and Truck Law makes the provision of rural service a requirement of entry into the motor carriage business. There is no incentive to provide rural service under the present entry and rate control apparatus, yet rural Missouri continues to receive service from the motor carrier industry.

A study by the Wyoming Public Service Commission, to determine the extent to which certificated carriers met their common carrier obligation, found that only half of the carriers authorized to provide service in eleven predominantly small towns did so.<sup>252</sup> A related study of a nine-state Rocky Mountain region found that the number of carriers actually providing service was half the number authorized to do so.<sup>253</sup> The deficiency in service implied by this finding was underscored by the results of a questionnaire sent to shippers in Utah, Wyoming, and Idaho. Not only did fifty-five percent of the respondents in rural areas rate motor carrier service unsatisfactory, but the survey also showed that sixty-six percent of the respondents used private carriage.<sup>254</sup>

Similar findings were made in Kansas, where the Post-Audit Division found that "many common carriers in Kansas do not serve small com-

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250. *Staff Paper, supra* note 35, at 1318-21.

251. *Id.* at 1318.

252. Snow, *supra* note 68, at 28.

253. *Id.*

254. *Id.*

munities even though they have authority to do so."<sup>255</sup> Common carriers account for fifty-four percent of rural shipping in Kansas; the remaining needs are met by private (thirty percent) and contract<sup>256</sup> (sixteen percent) carriers.<sup>257</sup>

Finally, in June 1981, the I.C.C. issued its first report on the impact of deregulation on service to small communities.<sup>258</sup> The report not only failed to substantiate the claim that rural areas would be adversely affected by deregulation, it actually found that changes resulting from deregulation had usually improved service.<sup>259</sup> Neither economic theory nor the empirical data supports the proposition that rural service is incapable of supporting itself without motor carrier entry and rate regulation. Rather, the data suggests that such controls contribute to inadequate rural service.<sup>260</sup>

Even if there were some validity to the cross-subsidy argument, a system designed to force urban shippers to pay part of the costs of rural shippers is difficult to justify on equity grounds. In the unlikely event such subsidies are necessary, more direct and precise means for achieving this goal are available.<sup>261</sup> There is simply no evidence that rate and entry control is an effective method for accomplishing such a task.<sup>262</sup>

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255. Audit Report, *supra* note 207, at 16.

256. *Id.* at 59. In Missouri, contract carriage is subject to the same entry control mechanism as common carriage. See MO. REV. STAT. § 390.061 (1978).

257. The search for alternatives to common carriage is a consistent response to the poor service, high rates, and lack of service options which characterize the regulated common carrier sector. Snow, *supra* note 68, at 28.

258. Interstate Commerce Commission, Office of Policy and Analysis, Interim Report: Small Community Service Study (June 1981).

259. *Id.* at I-1, I-2.

260. See R. L. Banks & Associates, *Service to Small Communities*, in REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 139 (P. MacAvoy and J. Snow ed. 1977); *Staff Paper*, *supra* note 35, at 1319.

261. Direct government subsidy would be a more precise and less wasteful method of subsidizing rural service than reliance on entry and rate regulation. See Snow, *supra* note 68, at 31.

262. A study of motor carriers in the northwest Rocky Mountain region found that the federal motor carrier regulatory system is not important in maintaining the viability of small rural communities. Two major findings led to this conclusion:

(1) Although the common carrier service obligations require carriers to serve all points in their operating certificates, common carriers in the current regulated environment are able to avoid serving small towns in isolated areas if they consider such traffic to be unprofitable or less attractive than traffic in their other markets, that is, the cross subsidization argument has no empirical support. (2) Communities are being served by other types of interstate carriers (UPS, private carriers, short-haul interstate carriers, and bus package service) and when all the various types of carriers are considered, including those regular-route common carriers offering service, the overall level of service is adequate to meet the needs of the communities.

Breen & Allen, *Common Carrier Obligations and the Provision of Motor Carrier Service to Small Rural Communities*, Q. REV. ECON. & BUS., Winter 1980, at 86, 104.

## VIII. REMEDIES: DEREGULATION AND ANTITRUST ENFORCEMENT

Increasing consumer welfare requires elimination of Missouri's statutory scheme for entry and rate regulation of intrastate motor carriage. In the long run, this means repeal of the offending provisions.<sup>263</sup> Proponents of deregulation, however, can anticipate stiff political resistance from those who derive pecuniary benefit from the existing system. In the interim, it may be possible to attack some of the most pernicious consequences of rate and entry regulation in the courts. The vehicle for this attack is the antitrust law.

One of the maxims of antitrust enforcement is that price-fixing agreements among competitors are per se<sup>264</sup> violations of the antitrust laws.<sup>265</sup> When firms band together to set single line rates collectively by way of rate bureaus, they are engaging in horizontal price-fixing.<sup>266</sup>

## A. State Action Immunity

Assuming price-fixing by rate bureaus is attacked under federal antitrust law, the defendants will likely assert that their activities are insulated under the state action immunity doctrine promulgated by the United States Supreme Court in *Parker v. Brown*.<sup>267</sup> Prior to the mid-1970's, private parties acting within the scope of state regulation confidently asserted this defense against liability for anticompetitive acts.<sup>268</sup> In the aftermath of several Supreme Court decisions beginning with *Goldfarb v. Virginia State Bar*,<sup>269</sup> the "state action" doctrine has become less useful to antitrust defendants.<sup>270</sup> In the recent case of *California Retail Liquor Dealers Association v. Midcal Aluminum*,<sup>271</sup> the Supreme Court held that two standards must be met to successfully interpose this defense: the restraint "must be 'one clearly articulated and affirmatively expressed as state policy,' " and it "must be 'actively supervised' by the State itself."<sup>272</sup>

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263. This would require repeal of the following provisions: MO. REV. STAT. §§ 387.030, .040, .050, .070, .100, .120, .130, .190; 390.041, .051, .061, .081, .091, .101, .106, .111, .116, .121 (1978). Safety and insurance provisions would remain intact under the proposed repeal.

264. See note 91 *supra*.

265. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940).

266. *Sims*, *supra* note 37, at 981.

267. 317 U.S. 341 (1943).

268. See, e.g., *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *Allstate Ins. Co. v. Lanier*, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966).

269. 421 U.S. 773 (1975). *Goldfarb* held that enforcement of a price-fixing schedule by state and county bars did not benefit from the state action immunity of *Parker v. Brown* because the activity was not compelled by the state. *Id.* at 792.

270. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

271. 445 U.S. 97 (1980).

272. *Id.* at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435

An examination of the Missouri Bus and Truck Law discloses that horizontal price-fixing by motor carrier rate bureaus is not insulated by state action immunity under the *Midcal Aluminum* standard. Nowhere does the Missouri statute permit horizontal price-fixing among competitors, or even mention rate bureaus. The closest it comes to giving affirmative legal sanction to collective price activity is to allow the establishment of "reasonable through routes and joint rates" pursuant to Missouri Revised Statutes section 390.116.<sup>273</sup> This section clearly deals with "rates covering a shipment in which one carrier operates over only part of the route and another carrier serves the remainder."<sup>274</sup> It does *not* require horizontal price agreements by competitors but is merely a device enabling a shipper to obtain a single price for a shipment involving more than one carrier.<sup>275</sup> This hardly amounts to a showing that collective rate-setting is a "clearly articulated . . . affirmatively expressed" . . . state policy.<sup>276</sup> The failure of rate bureau price-fixing activity to meet the threshold standard articulated in *Midcal Aluminum* vitiates the state action immunity defense for intrastate rate bureau activity.

This conclusion is strengthened by the decision in *United States v. Southern Motor Carriers Rate Conference*.<sup>277</sup> The case arose from an action brought by the Justice Department to enjoin collective rate coordination and publica-

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U.S. 389, 410 (1978)). In the course of articulating this two pronged test, the Court further observed:

The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The state simply authorizes price-setting and enforces the prices established by private parties. The state neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The state does not monitor market conditions or engage in any "pointed re-examinations" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ."

*Id.* at 105-06 (footnote omitted). See also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

273. (1978).

274. 455 U.S. at 105. For a discussion of interlining, see notes 142-43 and accompanying text *supra*.

275. For a discussion of the meaning of an Alabama statutory interlining provision virtually identical to MO. REV. STAT. § 390.116 (1978), see *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 474 (N.D. Ga. 1979), *aff'd*, 672 F.2d 469 (5th Cir. 1982).

276. *Midcal*, 445 U.S. at 105 (quoting *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)).

277. 672 F.2d 469 (5th Cir. 1982).

tion by the defendants, who represented intrastate common carriers before various state regulatory commissions.<sup>278</sup> The district court had rendered summary judgment in favor of the United States, holding that the defendants' rate formulations violated section 1 of the Sherman Antitrust Act.<sup>279</sup>

On appeal, the United States Court of Appeals for the Fifth Circuit characterized the issue as "whether a private party may avail itself of the [state action] exception only if the state compels it to perform the disputed actions."<sup>280</sup> In the course of surveying pre-*Midcal* cases construing state action immunity,<sup>281</sup> the court noted that "the Supreme Court has made clear that private parties can invoke the state action exception only if the state compels their actions."<sup>282</sup> The court specifically rejected the argument that *Midcal* eliminated any state compulsion prerequisite for private party invocation of the exception:

First, there is not the slightest hint in *Midcal* that the Court no longer agreed with its earlier holdings. To the contrary, the Court cited those holdings with approval, even quoting *Goldfarb's* statement that "[i]t is not enough that . . . anticompetitive conduct is 'promoted' by state action; rather, anticompetitive activities must be compelled by direction of the state acting as sovereign." . . . Second, the language the Court used to announce its standard, "clearly articulated and affirmatively expressed state policy," does not imply a departure from the compulsion requirement. . . . Moreover, in the context of private parties, *we cannot see how there ever could be a clearly articulated and affirmatively expressed state policy in any case in which the state allows an individual to choose at his whimsy the option of doing or not doing some act.*<sup>283</sup>

Turning to the defendants' activities, the court found that the rate-making activities were not compelled by the state and were therefore not exempt from the antitrust laws.<sup>284</sup>

### B. The Noerr-Pennington Defense

One of the most fertile fields for anticompetitive predation is through the abuse of administrative and judicial processes.<sup>285</sup> A potential impediment to antitrust enforcement in this area is the argument that those who use regulatory procedures for anticompetitive purposes are merely exercis-

278. The state regulatory commissions involved in this case were those of Alabama, Georgia, Mississippi, North Carolina, and Tennessee.

279. *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd*, 672 F.2d 469 (5th Cir. 1982).

280. 672 F.2d at 472.

281. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773 (1975).

282. 672 F.2d at 472.

283. *Id.* at 474-75.

284. *Id.* at 476.

285. R. BORK, *supra* note 51, at 347-48.

ing first amendment rights to petition and influence government.<sup>286</sup> Proponents of this defense rely on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*<sup>287</sup> and *United Mine Workers v. Pennington*<sup>288</sup> for the general proposition that attempts to influence government are immunized from antitrust liability.

Although the *Noerr-Pennington* doctrine does, in fact, shield much concerted activity directed toward government bodies from legal assault,<sup>289</sup> it does not afford complete immunity. In *California Motor Transport Co. v. Trucking Unlimited*,<sup>290</sup> the plaintiffs were small carriers operating within California. Their complaint alleged that the defendants, some of the largest trucking firms in the state, had conspired to weaken or destroy the plaintiffs' competing trucking businesses. The alleged vehicle for this conspiracy was a joint trust fund established to finance opposition to applications for operating rights before state and federal agencies and the courts.<sup>291</sup> In an opinion by Justice Douglas, the United States Supreme Court held that the first amendment did not immunize from antitrust scrutiny the use of administrative and judicial proceedings for anticompetitive purposes. Where the defendant's activities are " 'a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor,' " <sup>292</sup> antitrust liability can result.

The most direct treatment of an attempt by motor carrier rate bureaus to assert the *Noerr-Pennington* doctrine as a defense to collective rate-fixing is found in *Southern Motor Carriers*, discussed in the previous section. In addition to rejecting the state action defense, the Fifth Circuit agreed with the district court that collective rate formulation was "outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine."<sup>293</sup> The court distinguished between agreements to seek legislation, protected under the doctrine, and agreements that are nothing more than horizontal price-fixing.<sup>294</sup> While the case law is not extensive, *Southern Motor Carriers* is consistent with other authority holding that *Noerr-Pennington* will not immunize price-fixing conferences as a preliminary to petitioning government agencies.<sup>295</sup> The argument that collective rate-making comes under the rubric

286. *Id.* at 349.

287. 365 U.S. 127 (1961).

288. 381 U.S. 657 (1965).

289. *See, e.g.,* *Missouri v. National Org. for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

290. 404 U.S. 508 (1972).

291. This theory is explained in detail in the lower court decision. *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

292. 404 U.S. at 511 (quoting *Noerr*, 365 U.S. at 144).

293. 672 F.2d at 477.

294. *Id.*

295. *See* *United States v. Northern Cal. Pharmaceutical Ass'n*, 235 F. Supp. 378, 381 (N.D. Cal. 1964).

of the first amendment right to petition is further undermined when we recall that nowhere in the Missouri statutory motor carrier regime is this activity recognized as a legitimate or necessary aspect of rate regulation.

Although horizontal price-fixing by rate bureaus is the practice most vulnerable to antitrust attack, the most insidious behavior from a consumer welfare perspective may be the anticompetitive exploitation of the entry controls in Missouri Revised Statutes section 390.051.<sup>296</sup> We have already seen how administrative processes are used as instruments of cartel enforcement. The temptation must be great for incumbent motor carriers to make concerted use of the certification process in order to bar new competition. This type of activity is more similar to the type of conduct protected by *Noerr-Pennington*. The question is to what extent the use of administrative machinery will create antitrust liability.

One of the most intriguing decisions on the subject is the recent opinion in *Clipper Express v. Rocky Mountain Motor Tariff*.<sup>297</sup> In late 1970, Clipper, a freight forwarder,<sup>298</sup> submitted a tariff to the I.C.C. that it believed would be low enough to enable it to compete with unregulated shipper associations and shipper agents.<sup>299</sup> The Rocky Mountain Motor Tariff Bureau filed a protest to the tariff with the I.C.C., which investigated the rate for two years but did not suspend it. During the course of the investigation, Clipper filed a number of amendments lowering the rate and extending its geographic coverage. Although the I.C.C. consistently found in favor of Clipper throughout the investigation, the Tariff Bureau and competing carriers exhausted every administrative procedure in their effort to block the tariff.<sup>300</sup>

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296. (1978). To the extent the entry control process successfully bars new competition, incentives for cost control are reduced. The political visibility of profit rates tends to consume much time and energy of regulatory bodies in their determination of what constitutes a reasonable rate of return. Insufficient attention is paid to the absence of incentives to minimize costs when competition is suppressed—and costs make up a much greater fraction of the price of most goods and services than does profit. Thus, a small inefficiency can increase the price of a good much more than would a major increase in the profit rate. Thomas Sowell observes:

Regulated firms whose explicit financial profit rate is restricted have every incentive to allow costs to rise, taking various benefits in nonpecuniary forms, such as fringe benefits (especially for management), more relaxed (inefficient) management, less innovative activity and the headaches it brings, less unpleasantness such as firing people or hiring associates who are offensive in manner, race or sex. In addition, the more costs the regulated firm can accumulate—and get the regulatory agency to accept as valid—the higher its total profits at a given rate of profit.

T. SOWELL, KNOWLEDGE AND DECISIONS 198 (1980) (footnotes omitted).

297. 674 F.2d 1252 (9th Cir. 1982).

298. Freight forwarders are operators who ship no goods themselves, but who assemble and consolidate small shipments into single lots for shipment by other carrier companies.

299. 674 F.2d at 1257.

300. *Id.*

In 1972, Clipper filed an antitrust suit, alleging (1) the defendants' protests were shams designed to restrict, lessen, and prohibit competition from freight forwarders; (2) the defendants attempted fraudulently to influence the I.C.C. to gain a competitive advantage; and (3) the protests were part of a larger independent antitrust violation.<sup>301</sup> The district court granted summary judgment for the defendants, partly on the ground that *Noerr-Pennington* immunized their activities from antitrust liability.<sup>302</sup>

The United States Court of Appeals for the Ninth Circuit reversed, holding that for purposes of summary judgment Clipper had made a sufficient factual showing that the protests were spurious and "prosecuted without regard to their merit."<sup>303</sup> The most interesting part of the opinion was the court's discussion of the use of administrative protests to further a larger conspiracy to fix rates. The court observed that the defendants had engaged in the practice of refraining from offering lower rates to each other's customers, and that this was enforced, if necessary, "by vigorous protests against competitive rate publications."<sup>304</sup> The defendants claimed that these activities were shielded by *Noerr-Pennington*, regardless of whether they furthered an independent antitrust violation.<sup>305</sup> In rejecting that argument, the court, relying on *Trucking Unlimited*,<sup>306</sup> held that when there is a conspiracy prohibited by the antitrust laws, general antitrust principles apply where "otherwise legal litigation . . . is but a part of a larger overall scheme to restrain trade."<sup>307</sup> Applying that principle to the facts, the court stated:

No one has contended that the alleged price-fix conspiracy was intended to influence governmental actions. The defendants' actions do not enjoy immunity, even though a part of the actions may have involved protected first amendment petitioning. The reach of the *Noerr-Pennington* doctrine is not that extensive and the antitrust laws are not that impotent.<sup>308</sup>

*Clipper Express* is a potentially valuable addition to the arsenal of antitrust challenges to anticompetitive conduct in the motor carrier industry. As we have seen, abuse of the certification process is crucial to cartel enforcement. Cases like *Clipper Express* limit the zone of immunity from which incumbent carriers can mount collusive assaults on consumer welfare.

### C. State Antitrust Immunity

In 1974, the Missouri General Assembly enacted the Missouri Anti-Trust Act,<sup>309</sup> in part because the old law did not prohibit restraints of trade

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301. *Id.* at 1258.

302. *Id.* at 1256.

303. *Id.* at 1264.

304. *Id.* at 1273.

305. *Id.* at 1258.

306. *Trucking Unlimited v. California Motor Transport Co.*, 404 U.S. 508 (1972).

307. 674 F.2d at 1273.

308. *Id.* at 1279.

309. MO. REV. STAT. §§ 416.011-416.013 (1978).



occurring in connection with service activities.<sup>310</sup> As the Missouri Supreme Court has observed:

The Act closely parallels provisions of the Sherman and Clayton Acts of federal antitrust law. Section 416.031.1 of the Act makes unlawful every contract, combination or conspiracy in restraint of trade or commerce, conduct which is prohibited by § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Section 416.031.2 of the Act makes unlawful monopolization, attempted monopolization, and conspiracy to monopolize trade or commerce, conduct which is prohibited by § 2 of the Sherman Act, 15 U.S.C. § 2 (1976).<sup>311</sup>

In order to provide a "ready body of precedent for interpreting the law and a single standard of business conduct" for Missouri businesses, Missouri Revised Statutes section 416.141<sup>312</sup> directs that it "shall be construed in harmony with ruling judicial interpretation of comparable federal antitrust statutes."<sup>313</sup>

In *Georgia v. Pennsylvania Railroad Co.*,<sup>314</sup> the United States Supreme Court held that I.C.C. regulation of railroads did not immunize horizontal price-fixing by rate bureaus.<sup>315</sup> In response to this decision, prompted by vigorous lobbying by surface transportation interests, Congress passed the Reed-Bullwinkle Act<sup>316</sup> over presidential veto<sup>317</sup> in 1948. This law conferred express statutory immunity on the collective price-setting activities of rate bureaus<sup>318</sup> and, as President Truman feared, enshrined into law a sustained assault on consumer welfare.<sup>319</sup>

Although the Missouri Bus and Truck Law provides no express statutory immunity for horizontal price-fixing by rate bureaus, an antitrust defendant sued under state law may argue that immunity is conferred under Missouri Revised Statutes section 416.041.2,<sup>320</sup> which provides that nothing in the law "shall be construed to apply to activities or arrangements expressly

310. See Ashcroft, *supra* note 215, at 473.

311. *Fischer v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 312 (Mo. En Banc 1979).

312. (1978). See also Almstedt & Tyler, *State Antitrust Laws: New Directions in Missouri*, 39 MO. L. REV. 489 (1974).

313. MO. REV. STAT. § 416.141 (1978).

314. 324 U.S. 439 (1945).

315. *Id.* at 461.

316. Ch. 491, 62 Stat. 472 (1948) (codified at 49 U.S.C. § 56 (1976)).

317. See President Truman's veto message in 1948 PUB. PAPERS 330-32.

318. 49 U.S.C. § 10706 (Supp.IV 1980) terminates this immunity for interstate motor carriers on January 1, 1984.

319. Recent case law suggests a judicial willingness to impose significant limits on the extent to which collective price activity in the surface transportation industries is shielded by the Reed-Bullwinkle Act. See *United States v. Baltimore & O.R.R.*, 538 F. Supp. 200 (D.D.C. 1982) (Reed-Bullwinkle neither authorizes I.C.C. to approve particular rate agreements nor immunizes collusive ratemaking designed to eliminate competition).

320. (1978).

approved or regulated by any regulatory body or officer acting under statutory authority of this state or of the United States.” The validity of this argument is doubtful. In the single Missouri state decision<sup>321</sup> construing section 416.041.2, the plaintiffs were insurance brokers who alleged that the defendant had engaged in various anticompetitive activities in violation of the Missouri Anti-Trust Act.<sup>322</sup> The trial court dismissed the action, holding in part that all activities of the insurance industry were exempt from Missouri antitrust law under section 416.041.2.<sup>323</sup> The Missouri Supreme Court characterized the principal issue as “whether the provision is a codification of the ‘state action’ doctrine of federal antitrust law . . . or whether, as respondents contend, this provision exempts the insurance industry because its activities are regulated by state law.”<sup>324</sup>

The court cited the United States Supreme Court’s view that implied immunity from the antitrust laws is not favored and “‘can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.’”<sup>325</sup> Nowhere, said the court, is there an express exemption for regulated industries.<sup>326</sup> Applying the high Court’s *Goldfarb-Cantor* test,<sup>327</sup> the Missouri Supreme Court found that the defendant’s activity was neither required by the state nor impliedly exempted:

Nor does this case involve “activities or arrangements expressly approved” by the state. Nor is the alleged anticompetitive activity even arguably insulated on the ground that it is in compliance with state statutes regulating the insurance industry. . . . Under the “state action” exemption, anticompetitive activities are exempt if they are compelled by state regulations. The “state action” doctrine does not relieve antitrust liability for anticompetitive conduct which also violates state regulations for particular industries. This is not a case where an implied exemption from the Act is necessary “in order to make the regulatory act work” under the “state action” doctrine as articulated in *Cantor*.<sup>328</sup>

The Missouri motor carrier scheme contains no affirmative statutory or

321. *Fischer v. Forrest T. Jones & Co.*, 586 S.W.2d 310 (Mo. En Banc 1979).

322. *Id.* at 312. The plaintiffs alleged that the defendant had entered into agreements with the Missouri State Teachers Association to deprive the plaintiffs of necessary statistical data and to provide them with false and incomplete data. The petition also alleged that the defendant entered into agreements with school districts under which the districts could obtain group accident and health insurance only if they also purchased group life insurance. *Id.*

323. *Id.* at 311.

324. *Id.* at 313.

325. *Id.* (quoting *United States v. National Ass’n of Securities Dealers*, 422 U.S. 694, 719-20 (1975)).

326. 586 S.W.2d at 313. See generally Comment, *The Missouri “State Action” Antitrust Exemption*, 45 UMKC L. REV. 257 (1976).

327. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar Ass’n*, 421 U.S. 773 (1975). See text accompanying notes 267-72 *supra*.

328. 586 S.W.2d at 314.

regulatory sanction of horizontal rate agreements between competing carriers.<sup>329</sup> The decisional authority and commentary<sup>330</sup> establishes that mere acquiescence by regulatory bodies to anticompetitive practices will not provide antitrust immunity for rate bureau activities. At least one recent decision from a sister state has also refused to recognize implied or state action immunity for rate bureau price-fixing.<sup>331</sup>

The Missouri Bus and Truck Law declares that it "is enacted for the sole purpose of promoting and conserving the interests and convenience of the public."<sup>332</sup> This purpose cannot be served by tolerating horizontal price fixing by motor carrier rate bureaus. Although statutory repeal is an essential long term solution to the anticompetitive consequences of entry and rate regulation, antitrust enforcement would be a useful first step toward vindicating consumer welfare.<sup>333</sup>

## IX. CONCLUSION

This Article has taken the position that entry and rate regulation of Missouri's intrastate motor carrier industry serves none of the policy considerations that arguably support government regulation of natural monopolies. Where the activities of rate bureaus and their members amount to horizontal price-fixing, they violate the antitrust laws. One need not be persuaded of the universal validity of the producer-protection hypothesis of government regulation to conclude that the case for condemning such rate-setting is compelling.

We have also seen how entry control facilitates cartelization of the motor carrier industry and reduces the competitive discipline which encourages efficient low cost service. In addition to the absence of creditable theoretical support for motor carrier entry and rate control as a means of maximizing consumer welfare, the recent empirical literature casts serious doubt on the ability of this kind of direct marketplace intervention to ever yield acceptable results.<sup>334</sup> Unless we are prepared to redefine consumer welfare so as

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329. See MO. REV. STAT. §§ 390.011-.240 (1978).

330. See, e.g., Comment, *supra* note 326, at 286.

331. See State v. Wisconsin Motor Carriers Ass'n, 1980-81 Trade Cas. (CCH) ¶ 63,739 (Dane County Cir. Ct. 1981).

332. MO. REV. STAT. § 390.011 (1978).

333. Although state antitrust enforcement has attractive aspects, see, e.g., the *parens patriae* provisions of 15 U.S.C. § 15c (Supp.V 1981), certain factors make the likelihood of such action problematical. Given adequate resources and political incentives, state attorneys general may be willing to test the frontiers of antitrust, particularly if the target defendant is a prominent out-of-state enterprise. However, when state enforcement confronts politically potent in-state interests such as motor carrier associations, the enthusiasm for attacking even the clearest anticompetitive activity is likely to wane. See R. BORK, *supra* note 51, at 406. Cf. Ashcroft, *supra* note 215, at 507-13 (detailing Missouri enforcement actions).

334. Some who concede the producer-protection consequences of rate regulation may nevertheless be tempted to seek a solution that somehow preserves the

to legitimize economic inefficiency and the collection of monopoly profits by certificated carriers and their allies,<sup>335</sup> retention of Missouri's motor carrier entry and rate-making system is unsupported by any defensible conception of the public interest.

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rate control function of the P.S.C. in the motor carrier context. Well-meaning proponents of reform may thus suggest that the solution lies in appointing regulatory personnel who are properly trained and committed to efficiency-enhancing consumer-oriented rate-making policies. The legislature should reject this pristine delusion.

One of the more persistent themes in the literature of public utility regulation is the determination of the correct price level for monopoly industries. The conventional approach attempts to ascertain the appropriate rate level for the regulated enterprise based on "cost of service." The efficacy of this type of rate-making is questionable even in the "natural monopoly" context. When applied to competitively structured industries, this methodology is almost certain to yield inefficient results because it cannot adequately predict the price needed to attract capital investment, the elasticity of demand in a competitive market, changes in costs, or changes in efficiency. These problems are exacerbated by the need to make rules which are administratively practical. In studying the problems, Stephen Breyer, now a judge on the United States Court of Appeals for the First Circuit, has drawn two conclusions:

First, attempts to obtain economic precision in the regulatory process are unlikely to be worth the effort expended. Second, insofar as one advocates price regulation (or cost-of-service ratemaking) as a "cure" for market failure, one must believe the market is working very badly before advocating regulation as a cure. Given the inability of regulation to reproduce the competitive market's price signals, only severe market failure would make the regulatory game worth the candle.

Breyer, *supra* note 239, at 565. See also Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries*, 65 CORNELL L. REV. 303 (1980).

335. Political resistance to dismantlement of Missouri's motor carrier cartel enforcement scheme will not be limited to the motor carrier lobby. Several law firms in this state, who represent parties in the certification process, have a strong pecuniary interest in retaining the regulatory status quo. To the extent that intrastate carriers are unionized, deregulation will also be opposed by labor unions since freer entry could make organizing more difficult and labor could no longer bargain for a share of monopoly profits eliminated under competition. The railroads may also oppose deregulation out of fear that lower prices will divert traffic from rail to motor carrier modes. For a discussion of just who gets a piece of the regulatory pie, see Moore, *The Beneficiaries of Trucking Regulation*, 21 J.L. & ECON. 327 (1978).

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